APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-86

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FORREST S. TUCKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 24, 1971
CERTIORARI GRANTED MAY 3, 1971

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MARILYNE JUDSON

a witness called by and on behalf of the United States, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name, your address and occupation to the Court and to the jury.

A. Marilyne Judson.
Q. Your address?
A. 1818 Walnut Street.
Q. Your occupation?
A. Teller.
Q. Bank teller?
A. Teller.

DIRECT EXAMINATION

MR. KARESH: Q. Is it Miss or Mrs. Judson?
A. Mrs.
Q. By whom are you employed?
A. First Savings and Loan Association, Berkeley.
Q. California?
A. Berkeley, California.
Q. And how long have you been so employed with that company?
A. Now, I have been employed about a year and a half.
Q. Calling your attention to December 7, 1951, you were in the employ of this—what is it, the Federal—
A. First Savings and—
Q. Federal—
A. Federal First Savings and Loan Association.
Q. We will call it a bank?
A. Bank. All right.
Q. Just to make it simpler.
December 7, you say you were employed, 1951?
A. That's correct.

Q. How long did you work for the bank prior to that time?

A. Since September.

Q. What were your duties on December 7, 1951?

A. I was teller in the bank.

Q. Were you on duty December 7, 1951?

A. That's correct.

Q. I am going to show you a—Well, you tell me what that is, it is U. S. Exhibit 2 for identification.

A. This is our cash box that we keep coin and cash bills in.

Q. You keep both coins and cash?

A. Coins and cash—bills, yes.

Q. Calling your attention to December 7, 1951, did you see this box?

A. Yes.

Q. Where did you see it?

A. It was on a truck that we used—we keep all our records in that and—that we put in the vault every night.

Q. You wait on the counter as a teller?

A. Yes, I do.

Q. And do you have grill work over the counter or not?

A. No, there is no grill.

Q. It is just a—

A. About a foot of glass.

Q. The counter is about how high, as high as this lecturne here?

A. Yes, that's correct, just about that height.

Q. Then there is a glass that goes up from the counter?

A. That's correct.

Q. And how large is this glass or how high is it?

A. About a foot.

Q. You don't have any cage or anything?

A. No cage at all.

Q. Calling your attention to December 7, 1951, did anything unusual happen on that date?

A. Yes. The bank was held up.

Q. What time did the holdup take place?
A. About 12:45.
Q. Are you certain of the time or is that to the best of your knowledge?
A. That is to the best of my knowledge. I know it was somewhere around there.
Q. Tell us in relation to that holdup what happened.
A. I had just come back from lunch and I had just opened my cash drawer.
Q. Now, incidentally, when you came back from lunch and you opened up your cash drawer, were there any other employees in the bank?
A. Yes, there were four of us.
Q. And who were the other three?
A. Mrs. Macoskey, Mrs. Starnes, and Mrs. Wegner.
Q. Now, you were telling us about opening up the cash drawer, what is a cash drawer?
A. Yes, I unlocked it.
Q. Is that under the counter?
A. Yes, it is.
Q. When you opened up the cash drawer where was this cash box?
A. That was on the truck, about three feet in back of our drawer.
Q. Could someone leaning into the cage, just leaning into the cage now, with the feet on the floor, on the opposite side where you were, could they touch this cash box?
A. No, they couldn't.
Q. Go on, tell us what happened.
A. And a man came into the office and asked for nickels, two rolls of nickels.
Q. I can't hear you.
A. A man came into the office and asked for two rolls of nickels. I waited on him and gave him the change.
Q. Now let me ask you this: Had you seen this man at any time prior to the time he came in and asked you for the change, that is, give him change for nickels, or with nickels?
A. Yes, I had, two days previous.

Q. Did you see him on more than one occasion prior to December 7?

A. Yes.

Q. How many times prior to December the 7th?

A. Twice.

Q. What dates were they, if you remember?

A. It was the 5th and the 6th of December, Wednesday and Thursday.

Q. 1951?

A. 1951.

Q. Now, do you recall whether or not the man wore a hat?

A. Yes, he did.

Q. On one of the occasions or on all of the occasions?

A. On all of the occasions.

Q. Could you see his eyes?

A. Yes I could.

Q. Tell us what happened on December 7th. Now you are opening the box, the cash drawer, and giving him nickels. What else happened?

A. And he put the nickels into a brief case.

Q. Did he have a brief case?

A. Yes, he did.

Q. Go ahead, ma'am.

A. And he came over the counter.

Q. What do you mean, "he came over the counter"?

A. He put his knee up on the counter and his hand and just came right over and said, "This is a holdup."

Q. He vaulted over the counter?

A. Yes.

Q. Were the other girls there?

A. Yes, they were.

Q. Did he have anything in his hand?

A. Not at the time—well, he had his brief case in his hand as he was coming over the counter. When he got over, he showed us a gun.

Q. Now you say he showed you a gun. Where did he get the gun from?

A. Well, it looked like it was in his belt. I'm not sure because he had his back to me.

Q. And he showed you a gun?

A. Yes.

Q. And the other girls, were they nearby when he showed you the gun?

A. Yes.

Q. Do you recall the type of gun it was, or don't you?

A. I don't remember.

Q. In any event, it was a gun.

A. It was a gun.

Q. And what did he say?

A. When—

Q. When he showed you the gun what did he say?

A. He said, "This is a holdup," and he told us to get into the vault.

Q. Before he told you to get into the vault did he do anything, or don't you remember?

A. I don't remember.

Q. He told you to get into the vault?

A. He told us—I don't know the exact words, but it was for us to get into the vault.

Q. Did you get into the vault?

A. Yes, I did.

Q. And did the other girls get into the vault?

A. Yes.

Q. Did he tell you to stand or sit down or give you any instructions?

A. He told us to sit down.

Q. Did you sit down?

A. We didn't really sit. We sort of squatted down.

Q. Did you observe him when you were inside the vault?

A. Yes.

Q. At any time did this man—at any time did this man take any money?

A. Yes, he did.

Q. Did he touch this, open up this box, U. S. Exhibit 2 for identification?

A. Yes, he did.

Q. Was the box locked or did he get a key or do you know?

A. It was locked and he got the key for it.

Q. And do you know where the key was that he got?
A. Yes sir, I do.
Q. Where was it?
A. It was in a little drawer alongside of the teller.
Q. Do you recall whether you were inside the vault or outside the vault when he opened up the box?
A. We were going to the vault, I recall.
Q. What did you see him do in relation to this box?
A. He took it off the truck and put it over by the teller-s window.
Q. Go on.
A. And unlocked it.
Q. Were there any other customers in the bank at the time?
A. No, there weren't.
Q. Any male employees in the bank?
A. No.
Q. Go on, what did he do in relation to the box?
A. Then he opened it and took the bills out of it.
Q. Did the box contain both bills and coins?
A. Yes, it did.
Q. Did he take any coins, if you know?
A. Not that I recall.
Q. Were there any bills left after this man left the bank, in the box?
A. In the box, no.
Q. Did you observe him touch any cash drawers?
A. Yes, he touched both our cash drawers.
Q. Did he take anything from the cash drawers?
A. The bills.
Q. And who is the man, if you know, that held you up with the gun that day?
A. It was Mr. Tucker.
Q. Do you recognize Mr. Tucker in the courtroom?
A. Yes, I do.
Q. Will you point him out to the Court and the Jury?
A. He is the gentleman in the blue suit there, with the tie.
Q. Which gentleman in the blue suit?
A. It's the second man back.

MR. KARESH: Let the record show the witness has identified the defendant, Your Honor.

THE COURT: Yes, the record will show.

MR. KARESH: Q. Are you positive—

THE COURT: The man you identified is the second man seated at the counsel table, is that correct?

THE WITNESS: That's correct.

THE COURT: There isn't any question in your mind about it?

THE WITNESS: No question at all.

MR. KARESH: Q. That was the man?

A. That's right.

Q. And thereafter did you call the authorities?

A. I called the—No, I didn't myself, no.

Q. Someone did?

A. Yes, Mrs. Wegner did.

Q. Who is Mrs. Wegner?

A. Mrs. Wegner.

Q. Oh, after the holdup, the man left the bank?

A. Yes, he did.

Q. Did he put any money in the briefcase?

A. He put all of his bills in the briefcase.

Q. Did he run from the bank?

A. No, he didn't.

Q. Did he vault back over the counter or walk out some side door?

A. No, he walked—he walked down the length of the —where—behind the teller's cage, and went out a swinging door and just walked out.

Q. And then the officers came?

A. That's correct.

Q. All this took place in Berkeley, California, December 7th, 1951?

A. That's correct.

MR. KARESH: That is all.

* * * *

ETHEL M. STARNES,

a witness called by and on behalf of the United States, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name, your address, and your occupation to the Court and to the Jury?

A. Ethel M. Starnes.
Q. Your address?
A. 836 Collie Hill Drive, Walnut Creek.
Q. Your occupation?
A. I am a bookkeeper.
Q. Bank bookkeeper?
A. Yes, sir.

DIRECT EXAMINATION

MR. KARESH: Q. For whom were you employed as a bookkeeper?

A. First Savings and Loan, in Berkeley.
Q. Berkeley, California?
A. Berkeley, California.
Q. How long have you been so employed?
A. One and a half years.
Q. Were you so employed on December 7, 1951?
A. I was.
Q. Do you have access to the cash there?
A. Yes, sir.
Q. Do you have a cash box?
A. Yes, sir.
Q. Let me show you U. S. Exhibit 2 for identification and ask you if that is your cash box? Would you look at it?
A. Yes.
Q. Does that have your name on it or—
A. Just the "B" teller. That was mine.
Q. You are the "B" teller?
A. Yes, sir.
Q. Your duties comprise bookkeeper as well as teller?
A. I am now the bookkeeper. I am no longer a teller.
Q. But you were a teller then?

A. I was.

Q. And was this cash box in the bank—we will call it a bank—on December 7, 1951?

A. Yes, sir.

Q. Did it have any money in it?

A. Yes, sir.

Q. Did it have bills as well as coins?

A. Yes, sir.

Q. Calling your attention to December 7, 1951 again, was the bank held up?

A. Yes, sir.

Q. Were you there when the bank was held up?

A. Yes, sir.

Q. Do you recall about what time it was?

A. It was shortly after 12:30.

Q. How do you fix the time?

A. I was just about to go to lunch.

Q. Is that your lunch time?

A. Yes, sir.

Q. Who else was in the bank at that time?

A. Mrs. Judson, Mrs. Wegner, and Mrs. Macoskey.

Q. Any customers in the bank?

A. No, sir.

Q. Tell us about this bank holdup, tell us what happened, what you observed, what you saw, what you did, what the others did, if you know.

A. Well, I was sitting at my desk at the time.

Q. Would you talk to the Jury, please, ma'am.

A. I was sitting at my desk at the time, and this man came in and asked Mrs. Judson for some nickels, rolls of nickels.

Q. Let me interrupt and ask you this: How far away from Mrs. Judson were you?

A. About three feet.

Q. Did you hear the conversation about the nickels?

A. Yes, sir.

Q. Go on, ma'am.

A. And so he got the nickels—she got the nickels for him and gave them to him, and he—

Q. Where was he and where was she in relation to the counter?

A. He was right in front of her on the other side of the counter.

Q. She was inside the—we will call it inside the enclosure.

A. Yes, sir.

Q. Tell us what happened.

A. He put the nickels in his briefcase and as he jumped over the counter he said, "This is a stickup," and he came and jumped over.

Q. Ma'am, I'm sorry, but I can't hear a word you say. I'm very sorry.

A. He put the nickels in the briefcase.

Q. Did he put the nickels in the briefcase as he vaulted over the counter?

A. No, he put them away first.

Q. All right, go on. Well, could you see over the counter to see that he put the nickels in the briefcase?

A. Well, he had the briefcase up in front of him.

Q. Go on.

A. And as he started to jump over the counter, he said, "This is a stickup."

Q. Well, before he hit the floor?

A. Yes, sir.

Q. Or do you remember?

A. Yes, sir.

Q. Did he have anything in his hand other than the briefcase?

A. When he got on the other side of the counter he showed us the gun.

Q. What did he say when he showed you the gun; anything?

A. Nothing that I remember.

Q. I can't hear you.

A. Nothing that I remember.

Q. He said, "This is a stick-up," or "a hold-up," you say?

A. I think he said, "This is a stick-up."

Q. And he had the gun in his hand?

A. He showed us the gun, yes.

Q. Where did he take the gun from, do you remember?

A. I don't remember.

Q. But you saw it?
A. Yes.
Q. What else did he say and what else did he do?
A. He opened up my cash drawer and started taking money out, and I just sat there, and finally he said for all of us to go back to the vault.
Q. Did you go back into the vault?
A. Yes, sir.
Q. What about this cash box, did he do anything in relation to the cash box?
A. He took my key out of the little drawer that I have beside my cash box.
Q. Do you know how he knew your key was in the drawer beside the cash box?
A. Yes, sir, because I had waited on him the day before, for nickels.
Q. Had you opened up the cash box the day before with the key?
A. Yes, sir.
Q. Had you seen him on an occasion other than the day before December 7th?
A. Just the day before December 7th, is all.
Q. You waited on him?
A. Yes, sir.
Q. And you saw him the next day, December 7th?
A. Yes, sir.
Q. Now, did you see him take anything out of the cash box?
A. Well, he took the money out of the cash box.
Q. Well, what was in the cash box, what kind of money, bills, coins, checks, what, do you know?
A. There was coin on the bottom of the cash box and bills on top.
Q. Did he take the bills?
A. Yes, sir.
Q. Did he take any of the coins?
A. Not that I know of, sir.
Q. You went into the vault?
A. Yes, sir.
Q. Did you sit down on the floor?
A. I squatted on the floor.

Q. Did the other girls go in with you?
A. Yes, sir.
Q. And who were they, now?
A. Mrs. *Judson* and Mrs. Wegner, and, after awhile, Mrs. Macoskey joined us.
Q. In the vault?
A. Yes, sir.
Q. Do you recall whether or not he was wearing a hat?
A. Yes sir, he was wearing a felt hat.
Q. Do you recall how this person was dressed, other than the description of the hat?
A. No, sir. He had on a suit, though.
Q. Are you positive, or do you know?
A. Some coat.
MR. RUST: What was the answer, did he have on a suit?
MR. KARESH: Q. First I asked you, do you know how he was dressed. I asked you whether he wore a hat, and you said that he did. I asked you now if you know how he was dressed and I think you said you don't recall, and now you said a suit, now.
Will you tell us how, if you know, how he was dressed other than a hat?
A. I couldn't give a detailed description, no.
Q. Did he have a coat on?
A. Yes, sir.
Q. And you went into the vault, is that right?
A. Yes, sir.
Q. And did you observe him leave the bank?
A. Yes, sir.
Q. Where did he go, how did he get out of the bank?
A. He walked back towards the vault and out through the little door, out the front door.
Q. Where was this cash box when he handled it, this man handled it?
A. It was on a little—well, we call it a wagon, that we push in and out of the vault at night, and we keep it on this wagon.
Q. Could anyone have leaned over the counter and touched that box there without coming across the counter?

A. No, sir.

Q. Who was the man, if you know, that held up the bank with that gun that day and took the money?

A. I didn't know his name then, sir.

Q Well, do you recognize him in the court room?

A. Yes, sir.

Q. Will you point him out to the members of the Jury and to His Honor, the Judge?

A. He is sitting right down there.

Q. You say he is sitting right down there. There are four people sitting there. Which one do you mean?

A. Right across from Mr. Poole.

Q. Well, come down and point him out.

A. That man, there.

Q. Which one, Mr. Rust or that man?

A. This one, this one right—

Q. Will you touch him, please.

MR. RUST: We will stipulate she indicates the defendant.

MR. KARESH: Thank you.

Q. Did you ever see this Wanted Notice before?

A. Yes, sir.

Q. I haven't even shown it to you.

A. Yes sir, I have.

Q. When did you first see it?

A. I don't remember the date that I saw it.

Q. Was it before the bank robbery, after the bank robbery, in March of this year, April, January?

A. I don't know if it was in March or April.

Q. Of what year?

A. This year.

Q. Have you ever seen Mr. Tucker's, the defendant's, picture in the paper, the newspapers?

A. Yes, sir.

Q. Did you see his picture in the newspapers prior to the time you saw that or after?

A. I saw this first, sir.

Q. All right.

Now tell me the circumstances under which you saw that?

A. These pictures come in the mail.

Q. You mean these pictures—those types of pictures?
A. This type of picture.
Q. Tell us—
A. It was put on my desk.
Q. Go on.
A. And I looked at it and I said, "That's him."
Q. By "That's him," who do you mean?
A. That's the man that held us up.
Q. Whom did you tell that to?
A. I said it to Mrs. *Judson*, I believe.
Q. And then the local authorities were called in, is that right, the local police were called, is that right?
A. Mrs. *Judson* called.
Q. I can't hear you.
A. Mrs. Judson called the Berkeley police and Mrs. Macoskey called the FBI.
Q. And that's not a wanted notice for your bank robbery, is it, without saying what it is?
A. No, sir.
Q. That came in a routine fashion; as I understand it, you looked at it and said, "That's the man that held me up"?
A. Yes, sir.
Q. Are you positive that the man that you identified as the holdup man is the holdup man?
A. Yes, sir.
Q. Is there any question about it in your mind?
A. Not in my mind.
Q. Did he go through some of the drawers and take money out of them?
A. Both drawers.
Q. And, of course, the auditor came in and made a check of the missing amount, is that right?
A. That's right.
Q. Is that right?
A. Yes, sir.
Q. You testified that you saw a gun in the defendant's hand?
A. Yes, sir.
Q. That you are unable to identify the kind of gun?
A. Yes, sir.

Q. You are positive that it was a gun?
A. Yes, sir.

* * * *

MRS. ETHEL WEGNER,

called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

THE COURT: Would you indicate the identity of your next witness so the next witness may be in readiness. So that the attaches, after this witness, Mr. Garrett can call the next one.

That will give you, Mr. Garrett, an opportunity to advise the witness.

And now, ladies and gentlemen, we will take the afternoon recess, and the same admonition to you not to discuss the case under any circumstances nor to form or express an opinion until the matter has finally been submitted.

(Short recess.)

THE CLERK: Please state your name, address and occupation to the Court and to the Jury?
A. My name is Ethel Wegner.
Q. Your address?
A. 2267 Cedar Street, in Berkeley.
Q. Your occupation?
A. I am now the manager of the California State Employees Credit Union on the Campus.

DIRECT EXAMINATION

MR. KARESH: Q. On December 7, 1951—By the way, is it Miss or Mrs?
A. Mrs.
Q. On December 7, 1951, for whom were you working?
A. For the First Savings and Loan Association in Berkeley, the Berkeley office.
Q. Were you on duty that day?
A. I was.
Q. Did a holdup take place that day?

A. It did.

Q. Do you recall who was present when the holdup took place?

A. Yes. There were four women.

Q. Is that including yourself?

A. Including myself.

Q. Who were the ladies besides yourself?

A. Mrs. Marilyne Judson, Mrs. Ethel Starnes, Mrs. Vivias Macoskey, and myself.

Q. You were all employees of the association—we will call it the bank—at that time?

A. Yes.

Q. Tell us about the holdup that day, and tell me about what time it was that it happened.

A. It was about 12:30.

Q. How do you fix the time as 12:30?

A. Mrs. Judson, who was the teller, had just returned from lunch. Mrs. Starnes was about to leave for her lunch time. The man in question came to Mrs. Starnes' window—

Q. Did you observe him?

A. I did.

Q. Had you seen this man before that day, December 7?

A. On the two previous days.

Q. December 5th and December 6th?

A. Yes.

Q. And where?

A. In our office.

Q. On December 5th and December 6th—I am not speaking about December 7th—December 5th and December 6th, 1951, did this man ever go behind the counter?

A. No.

Q. Now go on with the events of December 7th.

A. Of December 7th?

Q. Yes.

A. Did you say December 7th?

Q. The holdup day.

A. Mrs. Judson had just finished waiting upon a loan customer and when she left—

Q. Was it a "she", the loan customer?

A. I'm very sorry, but I don't remember whether it was a man or a woman. I was at my desk doing my work.

Q. Go on. Was this customer in the bank when this holdup took place?

A. Yes. When the holdup took place?

Q. Yes.

A. I beg your pardon. The customer had left the building when the holdup took place.

Q. All right.

A. The man in question was the only one, besides the four women whom I have mentioned who were in the building at the time.

Q. Four women. You mean the three and yourself?

A. Three and myself.

Q. All right. Go ahead.

A. He came up to her window to ask for the roll of money that he had asked for previously on the two previous occasions.

Q. I don't quite understand what you mean previously or the two occasions. Would you just relate them, the events with this man as you remember?

A. Yes.

Q. All right.

A. Would you like me to tell you? It was his habit—

Q The jury is interested in the story. They want to hear the truth as best you can remember.

A. I will be glad to because I remember very distinctly that he had come in to ask for a roll of money.

Q. Go on.

A. For change. Which was not the custom in our type of organization for people to come in.

Q. You speak of custom in your type of organization. Have you discussed this matter with the other ladies?

A. I am just telling you why it was one of the reasons, that is, being this was not the usual thing.

Q. Can I ask you this, since leaving the room did you go out and speak to Mrs. Starnes and Mrs. Judson?

A. I talked to her, but not about this. I gave my word that I would not.

Q. Go on.

A. He came to the window to ask for the roll of money.

Q. Would you talk to the jury, ma'am.

A. When it was given to him—

MR. RUST: Now, just a minute. Excuse me. What day are we talking about?

A. We are talking about, right now I am talking about December 7.

MR. RUST: December 7. All right.

A. When the money was given to him, the roll of money, with the change—

Q. What do you mean the roll of money with the change?

A. The roll of money. There were two rolls of nickels and a dollar bill that was returned to him.

Q. In change—

A. For the five-dollar bill that he had given to the teller.

Q. Is this what Mrs. Judson told you or do you know that to be the fact?

A. I remember that.

Q. You were there and you saw it?

A. I was right there and I saw it. And suddenly he lept upon the counter—

Q. Could I interrupt—

A. —on top of the counter.

Q. How do you happen to remember this incident? Were you paying attention to this man?

A. I will be very glad to tell you because the first time that he came into our office I looked at him and I wondered why he particularly was in our office.

Q. What did he come in for the first time?

A. For the roll of money.

Q. And the second time?

A. Roll of money.

Q. You saw him three times?

A. I did, very definitely, because I knew he didn't belong there. That was the reason that he made the impression upon me. Why I felt that way, I don't know.

Q. Excuse me. What do you mean "didn't belong there"? I'm not speaking of the holdup.

A. Of course he didn't belong—not the holdup, to hold up the bank. I am telling you that was my impression when I first saw the man. He had no business in our—

Q. Don't people come in to change money once in a while?

A. Infrequently.

Q. Go on.

A. Yes.

Q. That is why you felt he had no right to be in there?

A. When I first saw him, I wondered why he was there. That was my immediate reaction to his presence in our building.

Q. Was he conducting himself in any suspicious or untoward way or anything?

A. No.

Q. You were just suspicious?

A. I was suspicious.

Q. From the first day he came there?

A. From the first day he came in.

Q. Go on, ma'am. By the way, on these three occasions was he without a hat?

A. No, he wore a hat.

Q. On all three occasions?

A. On all three occasions.

Q. You are positive of that?

A. Yes.

Q. All right. Go ahead.

A. We are back now to December the 7th?

Q. Yes, ma'am. You said something about "over the counter."

A. He lept over the counter, onto the counter and jumped down onto the floor.

Q. Did he have anything in his hand?

A. A briefcase, a new briefcase, a tan—it looked like leather, it may have been plastic, but it looked like leather.

Q. You remember he had a briefcase in his hand?

A. Yes.

Q. Did it have a handle on it?

A. Yes.

Q. Did you see him put anything in the briefcase?

A. The money out of the drawers, but first—

THE COURT: May I ask you to permit the witness, now that we have reached this point of continuity, to continue on uninterruptedly.

MR. KARESH: All right, Judge.

THE COURT: So that she may tell her own story, without any possible suggestion or any possible claim that there might be suggestion.

Go ahead.

A. He took out his gun, out of his—somewhere on his—

MR. KARESH: Q. Excuse me, I didn't mean to suggest, but I can see the witness—He took out this gun?

A. His gun.

THE COURT: Let the witness continue, Mr. Karesh.

A. Perhaps I'm not speaking clearly enough.

MR. KARESH: I won't interrupt you.

A. He took out a gun from his pocket and showed it to us and told us it was a holdup but not to do anything that would cause trouble.

THE COURT: Continue.

A. I, in a very agitated voice, told him, asked him what he was doing there, and told him he had no business to be there.

MR. KARESH: Continue, please.

A. He opened Mrs. Starnes' cash drawer, slipped through the checks, then he took out the currency and the rolled money and put it into his briefcase.

He went to the rack on which the ledger cards and on which—

MR. KARESH: Could I have the exhibits, please?

THE COURT: Continue, please.

A. —on which there were two coin boxes in which extra rolled money was kept. The coin box was—He brought the coin box back to the counter, took the key out of the drawer, opened it, took the money out of it, put it in his briefcase.

Then he proceeded to Mrs. Johnson's cash drawer.

MR. KARESH: Q. Where were you at that time?

A. Pardon me?

Q. Where were you at that time?

A. I was at my desk, right as close as from here to Mrs. Judson's counter, to perhaps the end of this desk.

Q. Go ahead, ma'am.

A. I was closer to Mrs. Starnes' counter.

Then he took the currency and the rolled money and the loose coin out of Mrs. Judson's cash drawer and told us then to get into the vault and to get down on the floor and not to get up until he left.

Q. Go ahead.

A. And we did exactly as he told us to do.

Q. What else happened after that?

A. When he was almost out the front door, then I went immediately to the telephone at my desk and called the police department.

Q. You have spoken about a cash box. Is this the type of cash box—Will you look at it, please?

A. Yes.

Q. Yes.

A. Yes.

Q. What did you do with this cash box?

A. He took the key out of the drawer, that is to the right of the cash drawer, opened it and removed it, removed the money.

* * * *

CROSS EXAMINATION OF FORREST TUCKER

MR. KARESH: Q. You admitted to Agent Poole, did you not, that that was your gun?

A. Yes, I did.

Q. Well, I thought you said you didn't want to answer any questions until you spoke to an agent. Why did you admit that that was your gun till you spoke to a lawyer?

A. When I was first picked up, they were questioning me about my name and so forth. They asked me if I had a gun, and I told them that I had a gun that I used to keep in the house for protection and my wife asked me to take it out of the house because she thought maybe the baby—we have a baby at home, a young child—would possibly get ahold of it. So I took it out of the house and put it in the glove compartment. When they asked me if I had a gun, I said, yes. I did not make

a statement that I had had it since 1951, since I have been out here, though.

Q. How long have you had it?

A. Approximately less than a year.

Q. How long?

A. Less than a year.

Q. Didn't you tell the agents you got that gun in Indiana?

A. No, I did not.

Q. Didn't you tell the agent that you stole that gun in Indiana when you were coming out to California?

A. I said I had taken the gun out of someone's glove compartment.

Q. Tell us about taking it out of someone's glove compartment.

MR. RUST: Object to that as irrelevant, immaterial, Your Honor, improper cross-examination.

MR. KARESH: He says that he had denied everything, that he wanted to speak to a lawyer.

MR. RUST: This type of testimony is highly prejudicial to this particular type of charge. It is certainly an improper cross-examination of the testimony that the defendant has given. In addition, it is irrelevant and immaterial.

THE COURT: Objection sustained.

MR. KARESH: Q. You said something about the records of the Walkup Drayage Company showed something. What did you mean by that?

A. It would show that the acquaintance that I had—in placing the date, in recalling the date of December the 7th, where I was at, the reason that I—. The reason that this comes to my mind as December the 7th that I was here in San Francisco is because of having lunch with this friend of mine on the first date he went to work, which the Walkup records will show was December the 7th, and it is the first day that he went to work for them. That is how.

Q. Have you looked at the records of the Walkup Company?

A. I have had it checked.

Q. You what?
A. I have had it checked.
Q. Who checked it for you?
A. An acquaintance.
Q. Who is that?
A. I believe Mr. Rust checked that record.
Q. I mean before that.
A. No one.
Q. Mr. Bellew was working for the Walkup Company on December the 7th?
A. Yes, he was.
Q. Since you have been arrested have you spoken to Mr. Bellew?
A. I have.
Q. On more than one occasion?
A. I have.
Q. Where did you talk to him?
A. In jail.
Q. And after you spoke to him you had the records checked?
A. After I spoke to him?
Q. Yes.
A. Why, of course. I asked him what day was it I met him first. He told me the sixth. I told him, "Well, in that case, you and I were having lunch on the following day. It definitely shows that I couldn't have been in Berkeley at the time because just by the fact that I had lunch with you that day."
Q. Had you ever had lunch with him on any other days?
A. Many days.
Q. Do you remember them?
A. Yes.
Q. Where were you January 31, 1952, were you with Mr. Bellew?
A. January 31, 1952?
MR. RUST: That is irrelevant and immaterial.
MR. KARESH: It is to test the credibility of the witness.
MR. RUST: It is not within any of the issues.
MR. KARESH: It goes to the credibility.

THE COURT: Objection sustained.

MR. KARESH: Q. Were you in the vicinity of the American Trust Company on that day?

MR. RUST: On which day?

MR. KARESH: January 31, 1952.

MR. RUST: Well, that is the objection that was sustained. Same objection.

MR. KARESH: Q. Have you ever been convicted of a felony?

A. Yes, I have.

Q. On more than one occasion?

A. Yes, I have.

Q. List them.

A. What?

Q. List them and for what.

A. Automobile thefts.

Q. Tell us all—more than one. You were convicted in Florida, were you not?

A. Yes, I was.

Q. For what?

A. Automobile theft, breaking and entering.

Q. What do you mean "automobile theft, breaking and entering"?

A. It boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, received a ten year sentence for it.

Q. At the age of 17 you received a ten year sentence?

A. Yes.

Q. When was that?

A. 1938.

Q. You broke into a place and stole a car?

A. Yes.

Q. What kind of car did you steal?

A. '36 Ford.

Q. Tell us about your other convictions.

A. 1946 I broke into a jewelry store.

Q. And where at?

MR. RUST: These are convictions, I take it, convictions limited to felonies? Otherwise I am going to object to it.

MR. KARASH: I mean felonies.

THE COURT: Are these convictions for felonies?

MR. KARESH: Yes.

Q. All right, sir, the next felony you are talking about.

A. Broke into a jewelry store.

Q. Where?

A. New Orleans.

Q. Night or day?

A. Night.

MR. RUST: I don't think, if the Court please, he is obligated or required to go into details of the conviction. I think the question is limited to whether he has been convicted.

MR. KARESH: Well, Your Honor, in the famous Alcatraz case I recall Mr. Hennesey went into the—not only whether he was convicted of a felony but the nature of the felony and the sentence secured, and the Circuit here has upheld it.

MR. RUST: I know of no case that holds that you can go into details of convictions. Do you have a case?

THE COURT: I think it would suffice for the purposes of this examination if you asked the question, put the question to the witness with respect to his prior convictions, and he has admitted two prior convictions—hasn't he?

MR. KARESH: Q. As a matter of fact, you have been convicted on three prior occasions?

MR. RUST: Now, here is the same objection to that word "convicted".

MR. KARESH: Q. Of felonies on three prior occasions. I have the right to ask that?

THE COURT: You have the right.

MR. KARESH: Q. Tell us about the third one, if there was one.

A. The third one—

MR. RUST: I think Your Honor, again this question must be limited to the conviction and the place, not the detail of evidence concerning that.

MR. KARESH: The defendant attempts to explain away this first one, Your Honor. He said that he was 17.

MR. RUST: Well, that was in response to your question. You can't complain about that.

MR. KARESH: All right, then I have the right to ask him the nature.

THE COURT: You have a certified copy of the transcript?

MR. KARESH: Yes, I have copies of the convictions. I would like to ask him about a conviction in Florida in 1950.

A. That is true.

Q. Armed robbery, wasn't it?

A. It was.

Q. So you have been convicted of three felonies, and one is armed robbery.

A. That's true.

* * * *

Q. Why did you use the name of Rick Bellew, if you did?

A. Because I was a fugitive from Florida.

Q. You were a what?

A. A fugitive.

Q. A fugitive from what?

A. I had been sentenced to a term in Florida for the third conviction that you just brought up, and while waiting transportation to prison I was given a chance to—nobody was watching me, and I walked off down there and came out to California.

Q. Where did you walk away from?

A. I was having my appendix removed in the hospital, before I was—

MR. RUST: I object, Your Honor.

MR. KARESH: He brought up the subject.

MR. RUST: It doesn't have anything to do with details—If he wants to explain why he was using the name, that's one thing.

MR. KARESH: He started, I didn't.

THE COURT: The objection is overruled. This is a voluntary statement.

* * * *

WEDNESDAY, MAY 20, 1953

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(Oral arguments in closing presented on behalf of the respective parties.)

(The Jury was thereupon instructed by the Court.)

(The Jury withdrew for their deliberations.)

(The verdict of the Jury was read and entered in open Court, finding the defendant guilty as to the charge in the indictment.)

(The Jury was excused.)

---oOo---

THE COURT: Do you have any motions?

MR. RUST: I have no motions.

THE COURT: Mr. Karesh, do you have anything to say?

MR. KARESH: Nothing, Your Honor. I would say, Your Honor, the Agent is present in Court.

THE COURT: I would like to have the Agent's testimony with respect to the prior convictions.

MR. KARESH: Perhaps, Your Honor, in order that counsel might protect the record—I make it only as a suggestion, Mr. Rust—Mr. Rust and I have been in many court matters together before—I would suggest, to protect the record, he make a motion now for a new trial, in arrest of judgment, all the statutory grounds—just as a suggestion. I don't know whether he wants to or not.

THE COURT: Counsel made motions during the course of the trial for judgment of acquittal. I denied all and singular said motions and are you advised now to make a motion?

MR. RUST: I personally see no point in making a motion for a new trial. It does not effect his after rights if he wants them one way or the other.

MR. KARESH: It might—

THE COURT: The motion in arrest of judgment equally would be without point.

MR. RUST: That's right.

THE COURT: And equally, Mr. Rust is fairly familiar with the practice of the Court. If he made a motion for probation, I would deny the motion.

MR. RUST: I understand that. I don't want to go through futile proceedings. That's it.

As a matter of fact, he has no eligibility for that anyway. If it were referred, it would only be a matter of making a report.

WILLIAM POOLE,

having been first duly sworn, testified as follows:

EXAMINATION BY THE COURT

THE COURT: Are you prepared, Mr. Poole, to tell the Court the convictions of the defendant from your record and sentences heretofore imposed in other districts in other cases?

A. Not right off-hand. I believe the certified copies are there. Don't you have your FBI—

THE COURT: Do you have a certified copy so that the witness' recollection may be refreshed?

(Document handed to witness)

THE COURT: You have your FBI record. The first conviction involved a matter wherein the defendant stated that he was a juvenile at the time.

MR. KARESH: Mr. Poole, would that appear in the amount of time served? Would that appear in the FBI report?

THE WITNESS: No. The FBI report does not reflect the time served. As the defendant said, when he was a juvenile, I believe it was in 1938, he received a ten-year sentence in Florida. Now, when we interviewed him as to the amount of time served, we have no way of knowing, but he said that he had served five years and four months on that particular one.

MR. KARESH: I was going to suggest, if there is any dispute, the defendant might so inform the Court through his counsel.

THE COURT: There isn't any dispute on his part. The dispute concerns itself as to whether or not he was a juvenile at the time. Was he a juvenile?

A. Well, he is, I believe, 32 years now, and that was the original sentence in 1938—that's approximately 14 to 15 years ago, and he would have been a juvenile, yes.

Then in 1946, I believe it was, in Florida—

THE COURT: What was the first offense, what is that first offense involved, was it a breaking and entering?

THE WITNESS: It was a grand larceny, breaking and entering. It had to do with the theft of a motor car.

MR. KARESH: I notice, Mr. Poole, from one of those convictions—it is attached—he was sentenced to 11 days at hard labor, or am I wrong?

THE WITNESS: Yes, that's a misdemeanor.

THE COURT: Could I glance at that sheet of paper?

(Document handed to Court)

MR. KARESH: Those documents that you showed His Honor, that has to do with the Florida convictions?

THE WITNESS: That's right.

MR. KARESH: Both the early one and the last one?

THE WITNESS: Yes. Those documents there contain the records of all of his convictions in the State of Florida.

MR. RUST: Mr. Poole, the defendant just informed me that he stated that he served five years and some months on the chain gang of a seven year actual confinement altogether.

THE WITNESS: That's probably correct. He said there was five years and four months on the chain gang. And the rest of the sentence on the first, and he said he actually served two years beyond that. Yes.

MR. KARESH: So he got that sentence as a juvenile. He was about 17 and he got that sentence?

THE WITNESS: Yes.

THE COURT: He had five years to run consecutively.

MR. KARESH: With relation to the recent conviction in Florida—His Honor has the Florida papers—what about that, the—before you go to the Louisiana one.

THE WITNESS: In 1950 Mr. Tucker was sentenced to a five year term in the State of Florida, for, I believe it was burglarly, and on January the 5, 1951, while in custody in the hospital, he escaped.

MR. KARESH: Now what about the Louisiana conviction?

THE WITNESS: In 1946 he was convicted in the State of Louisiana on a felony charge and given a term of 4 years.

MR. KARESH: Do you know how much of that he served?

THE WITNESS: Off-hand, I do not know.

MR. KARESH: What was that felony for, do you know?

THE WITNESS: According to this, it says here Article 62 of the Louisiana Criminal Code. It does not further describe that. However, I believe it was a burglary.

MR. KARESH: Has he got a family, do you know?

THE WITNESS: Yes, at the present time he is married. He was married, so he told me, in September of 1951, and at the present time he has a child approximately five or six months old.

MR. KARESH: Does he have parents alive, do you know? Do you know where he comes from or anything of his background?

THE WITNESS: Yes. His home is in Louisiana. He has a brother, I believe, in Arizona, and the rest of his folks are in Florida. I'm sorry, not Louisiana.

MR. KARESH: Does he have any military service of any kind or character?

THE WITNESS: Not that I know of.

MR. KARESH: Now he is presently, and I think Your Honor should know this, under charge, an indictment returned in the Southern District of California for bank robbery. Is that correct?

THE WITNESS: That's correct. According to information we received, the trial of Tucker and also Bellew

is set forth for June the 1st in Los Angeles in the Federal Court for bank robbery.

MR. KARESH: What kind of bank was it that they are charged with robbing?

MR. RUST: How could that be, when he hasn't pleaded.

MR. KARESH: I will tell you what happens. Bellew was here and Bellew was removed, and apparently—

THE COURT: Bellew testified in this case.

MR. KARESH: Bellew testified in this case, yes. Bellew is the man that testified. He was removed to Southern California to face that indictment. We did not take Mr. Tucker down because his trial was set here. Thereafter pursuant to writ of habeas corpus ad testificandum Bellew was brought back and apparently the court there has set the trial of Bellew, in anticipation of this trial being over by now. He will probably be brought down there for trial.

Now, he is a suspect in other robberies, without mentioning them?

THE WITNESS: Yes, he is, in this District here.

MR. KARESH: How many?

THE WITNESS: He is a suspect at the present time in four bank robberies in this area, and also in cases that the local police have, probably about seven or eight loan companies, over which there is no federal jurisdiction.

MR. KARESH: I say this, Your Honor, the reason I bring this out, is not because since he has been found guilty that that should be taken into account in increasing punishment, but I only tell you so that Your Honor will know that perhaps he will face other charges. But I do know that he has that indictment in California, in Southern California, and he will have to face trial.

THE COURT: These offenses in the main involve armed robbery, do they?

THE WITNESS: Yes. I would say that all of these robberies were with the use of firearms.

MR. KARESH: Wasn't there a shooting in one in Southern California?

THE WITNESS: The one in Los Angeles—

MR. RUST: Are you speaking about a recent one? You are not talking about the convictions?

MR. KARESH: No recent—

MR. RUST: On March the 6th, 1953, there was a bank robbery in Los Angeles and during the course of which several shots were fired by one of the men perpetrating the bank robbery and by a guard from the nearby insurance company that they attempted to stop the bank robbery. However, neither individual was injured.

MR. KARESH: But that is the trial coming up?

THE WITNESS: That's correct.

MR. KARESH: Has he ever had any gainful employment, do you know?

THE WITNESS: I would say to my knowledge, since his escape, he has had no gainful employment other than he, as he said, music arrangement and I believe he has indicated that when he first came to this area, he had several odd jobs around garages, such as washing cars and things of that nature. He has also indicated that he worked for several months in 1951 on tug boats in the Bay. So far that has not been verified.

MR. KARESH: Did he have any property when he was apprehended, any personal property or real property or money in the bank that you know of?

THE WITNESS: Yes, at the time he was apprehended, I would say as far as money is concerned, between what was found in several safe deposit boxes and on his person, there is approximately, oh, seven, eight hundred dollars. I'm not sure which.

MR. KARESH: And this automobile?

THE WITNESS: He had the automobile. Then he had, of course, the furniture in his apartment, and things of that nature. Also he had a 1940 Ford Car, which was more or less a hot-rod. He has been more or less a hot-rod driver, and he has told us that the equipment that is on that particular Ford probably makes that Ford worth between three or four thousand dollars.

MR. KARESH: Well, in relation to the automobile that you gentlemen found him in, how much does he owe on that car?

THE WITNESS: I believe the Lincoln that he had, as he testified, he had made the down payment with the Mercury, and at the time of his apprehension I do not believe he had made any further payments on it.

MR. KARESH: The Bureau has the car now or—

THE WITNESS: To my knowledge either the Bureau has it or it has been turned back to the legal owner, the Bank that financed it.

MR. KARESH: This gun that was found on the defendant, have they been able to trace it or anything like that?

THE WITNESS: No, at the present time we have been unable to trace it.

MR. KARESH: Could I ask counsel whether counsel has any objections to the Court entering an order turning this gun over to the Bureau?

MR. RUST: I don't know if I have any authority to make it.

MR. KARESH: All right. We will renew the request later.

Is there some section, Mr. Poole, that you know of—I should know that—that a gun allegedly used in a holdup can be confiscated?

THE WITNESS: I believe in the past it has been done by a court order, and it has been turned over to us.

MR. RUST: There is such a thing in the State procedure, but I am not familiar with it in the Federal.

MR. KARESH: There may be in the Federal.

THE WITNESS: Well, I would say this, that—

THE COURT: I recall in the Hall of Justice we always made an order of confiscation of guns. What happened to the gun thereafter was always problematical. At least we made an order.

MR. KARESH: We will ask for the order. If it is illegal, they can vacate it. The only thing is, assuming that the Court has the power to make the order, will counsel object to the withdrawing of the gun from evidence?

MR. RUST: I have no objection to withdrawing it from evidence.

THE COURT: Is there something unusual about this particular gun?

MR. KARESH: No. The Bureau has asked for the gun.

THE COURT: It is a Spanish make, is it?

THE WITNESS: When this particular gun was submitted to our laboratory in Washington for ballistic tests, when they returned it, they requested that we attempt to get a court order as they would like to have that gun in the laboratory for testing purposes in future cases.

THE COURT: For experimental reasons?

THE WITNESS: That's correct.

THE COURT: Under those circumstances, I think it is not out of order.

MR. KARESH: And the bullets, of course, that were taken—

THE COURT: The defendant will not have much use for it in the future.

MR. KARESH: I have no other questions.

THE COURT: Mr. Rust, do you have any questions?

MR. RUST: I have no questions, Judge. I am just wondering how much the Court should take into consideration of these pending charges—which the Court has no way of knowing the truth or falsity of.

THE COURT: I am not going to take into consideration in the matter of sentence the Los Angeles case because that will be dealt with appropriately. Either he will be acquitted or convicted.

Does the defendant have any questions to ask at all? You can ask through your attorney or individually.

MR. RUST: Do you want to ask Mr. Poole any questions?

THE DEFENDANT: No.

THE COURT: Do you know anything about the defendant's wife? Is she employed?

THE WITNESS: At the present time, she is unemployed, but I understand that his wife comes from a good background in the San Mateo area and apparently up to the time of Tucker's apprehension, she was unaware of his true identity and his activities and apparently she believed that he had a legitimate occupation.

THE COURT: And this child of five is a result of that union?

THE WITNESS: That is correct, yes.

THE COURT: She has relatives, has she?

THE WITNESS: Yes, she has.

THE COURT: Rather substantial people?

THE WITNESS: Yes. So our investigation indicates that they are. I believe at the time of his marriage, I believe they had a church wedding down at San Mateo.

MR. KARESH: They met out here?

THE WITNESS: That's right.

MR. KARESH: They met, without mentioning names.

THE WITNESS: That's correct.

MR. RUST: Do you want to ask Mr. Poole any questions?

THE DEFENDANT: I don't care to ask any questions, no.

THE COURT: Would you like to make any suggestion, Mr. Defendant, in your own behalf?

THE DEFENDANT: Yes. Well, I would like to make—there was a question of how much time I have done on sentences given to me. The record will show I have—I am not asking for anything that is not due me, but I would just like to point out that I had never been given probation, suspended sentence or parole on any sentence that has been handed down. I did seven years out of the ten that was given me, and the four in Louisiana, I did 45 months on it, and the five year sentence that was given me, I was convicted by a judge—the same judge that gave me the five, gave me the ten to start with, and I was innocent of—that's neither here nor there, but I mean he found me guilty and subsequently I escaped and came out here. Now, I have been found guilty today. So I stand guilty here.

THE COURT: How old were you when you first suffered a conviction—17?

THE DEFENDANT: Yes, sir.

THE COURT: These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

THE DEFENDANT: I understand it does carry a heavy penalty.

THE COURT: Do you know the reason underlying it?

THE DEFENDANT: Yes, sir.

THE COURT: There is no room for the Court to entertain elements of great sympathy because you were

armed on the occasion in question and you probably would have shot, had the occasion arose.

THE DEFENDANT: I have never been known to strike anybody, shoot anybody or harm anybody.

MR. KARESH: Could I ask the agent a question? Is there any evidence of violence in the past criminal record —I don't mean the bank robberies—any of these larcenies that you know of?

THE WITNESS: No. There is no actual shooting or anything of that nature.

THE COURT: How long has this association with Rick Bellew been going on, since 1951 and '52?

THE WITNESS: That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when he found out that he had served—he was serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

THE COURT: Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

THE WITNESS: I would say this, that on the local loan companies in the Oakland Area—

THE COURT: What kind of loan companies are they?

THE WITNESS: Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similar, in effect, of what was presented here, on those particular cases.

THE COURT: Do have fingerprint testimony and the like?

THE WITNESS: I believe that there is, yes.

THE COURT: I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

THE WITNESS: Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

THE COURT: I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

THE WITNESS: I believe so.

THE COURT: All right. Do you have anything further?

MR. KARESH: No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

THE COURT: There is one count in the indictment?

MR. KARESH: Yes, Your Honor.

THE COURT: Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its findings has indicated that the defendant did knowingly, wilfully and unlawfully put in jeopardy the lives of the afore named employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

Accordingly, Forrest Silva Tucker, are you ready for sentence?

THE DEFENDANT: I am.

THE COURT: It is the judgment and sentence of this Court that you be confined in a Federal penitentiary for the term of 25 years.

That is all.

(Thereupon the adjournment was taken.)

MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO VACATE SENTENCE

GEORGE B. HARRIS, Chief Judge.

Forest Tucker was charged by indictment with having committed an armed robbery of the First Savings and Loan Association in Berkeley, California, on December 7, 1951. After trial by jury before this Court he was found guilty as charged on May 20, 1953. He was sentenced to serve a term of 25 years.

He has filed a motion herein pursuant to Title 28 U.S.C. § 2255 seeking to vacate said sentence after a lapse of 15 years. He contends that the sentence should be vacated for the reason that evidence of prior invalid convictions was referred to on cross-examination of the defendant during the trial for purposes of impeachment.

Tucker, in effect, urges that the rationale of Burgett v. State of Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed. 2d 319 (1967)[1] bars the use of felony convictions for *impeachment*, when those convictions were obtained in violation of the standards of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1961).

The United States Attorney has conceded that with respect to two of said prior judgments of conviction, the defendant was not informed of his right to the assistance of counsel and did not waive his constitutional right to be represented by counsel.[2] Respondent denies that petitioner was thus prejudiced and contends that the rule of *Burgett* has no application. Further, that it is not to be retroactively applied.

The Court has concluded:

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[1] "To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269, 86 S.Ct. 1477 [16 L.Ed.2d 526]), is to erode the principle of that case." (p. 115, 88 S.Ct. p. 262)

[2] Findings and Judgment of Court in People of the State of California v. Forest Silva Tucker, #25174, Dept. 2, Superior Court of the State of California, In and for the County of Alameda.

(a) That the use of the constitutionally invalid prior convictions on cross-examination for impeachment purposes was error;

(b) That the error was harmless under the standards of Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The Factual Background

The evidence presented at the trial overwhelmingly supported the charge contained in the indictment. The Government's case in chief consisted of the following evidence:

Four employees of the Savings and Loan Association made in-court identification of Tucker as the man who had committed the robbery on December 7, 1951. These employees were:

1. Marilyne Judson [3] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 5, 1951 and December 6, 1951.[4] She further testified that Tucker touched a cash box in the course of the robbery,[5] and that the cash box could not be reached by a customer under normal circumstances;[6]

2. Ethel Starnes [7] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 6, 1951.[8] She further testified that Tucker took money from her cash box during the robbery.[9]

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[3] RT 27-50

[4] RT 31

[5] RT 34

[6] RT 30

[7] RT 51-69

[8] RT 56

[9] RT 56

3. Ethel Wegner[10] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 5, 1951 and December 6, 1951.[11]

Sebastian Latona,[12] Federal Bureau of Investigation fingerprint examiner with twenty-one years experience, testified that Tucker's fingerprint was found on the cash box which Marilyne Judson and Ethel Starnes had previously testified was touched by Tucker in the course of the robbery.

Howard Neuberg,[13] Special Agent for the Federal Bureau of Investigation, testified that Tucker claimed that his name was Rick Bellew when Neuberg arrested him.

William Poole,[14] Special Agent for the Federal Bureau of Investigation, testified that he interviewed Tucker after his arrest and that Tucker told him that he had never been in the First Savings and Loan Association in Berkeley. Poole also testified that Tucker told him that he had owned the gun found in the car since February, 1951.

Tucker's defense was based on his own testimony and that of his friend Rick Bellew, whose name Tucker had used when arrested. Rick Bellew testified that he was having lunch with Tucker in San Francisco at the time when the robbery occurred.[15] On direct examination, Tucker denied that he told Special Agent Poole that he had never been in the First Savings and Loan Association in Berkeley,[16] claimed that he had been there on December 5, 1951,[17] and claimed that he was having

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[10] RT 70-95

[11] RT 72

[12] RT 116-145

[13] RT 16-20

[14] RT 112-115

[15] RT 197-205

[16] RT 156

[17] RT 156

lunch with Rick Bellew at the time of the robbery.[18]

On cross-examination, Tucker claimed he had owned the gun found in the car for only one year, and denied making a contradictory statement to Special Agent Poole. Tucker committed himself to the position that he had touched Ethel Starnes' cash box while it was on the counter, and had touched the box only one time.[19] Tucker claimed that much of the money on which he was living was obtained by writing songs for various persons, but he refused to disclose the names of any of those persons.[20]

On rebuttal, Tucker's story was thoroughly discredited, and hence his credibility impeached, by further testimony from fingerprint expert Latona, and Savings and Loan Association employee Ethel Starnes. Latona testified that Tucker's same fingerprint was found in two places on the cash box, thereby discrediting Tucker's story that he had touched it only one time.[21]

The Error Was Harmless Under the Standards of Chapman v. State of California

The question of guilt or innocence in the case at bar was manifestly not a close one. This Court is of the firm belief that the error, as conceded, was harmless beyond a reasonable doubt.

Although the invalid prior convictions were referred to on cross-examination, they were in effect merely cumulative, in that Tucker's testimony had been successfully impeached by prior inconsistent statements made to the Federal Bureau of Investigation agents, and by rebuttal testimony which demonstrated that portions of petitioner's testimony was improbable and untrue.

Tucker's testimony was successfully impeached, and, in fact, demolished by additional items:

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[18] RT 153

[19] RT 177-179

[20] RT 190

[21] RT 133

(a) He was impeached by the prior inconsistent statements he made to agent Poole that he owned the gun found prior to the robbery, and that he had never been in the First Savings and Loan Association in Berkeley.

(b) The Government's testimony of Latona and Starnes proved beyond doubt that Tucker's story about touching the cash box once while it rested on the counter was a complete fabrication.

(c) The Government's case in chief pointed unerringly to Tucker as the perpetrator of the armed robbery, and in part consisted of direct evidence supplied by four eye witnesses to the robbery, each of whom had a clear and unobstructed view of the robber.

It should be manifest that Tucker's testimony was contradicted by convincing and extensive evidence offered and introduced by the prosecution.

The use of the prior convictions did not infect the trial proceedings so as to result in a miscarriage of justice, and there is no reasonable possibility that the error complained of contributed to the ultimate conviction.

The Court concludes that the foregoing references, together with a review of the trial transcript, represent a compelling showing justifying the finding that the claimed error was harmless beyond a reasonable doubt. Cf. In re Dabney, 71 A.C. 1, 76 Cal.Rptr. 636, 452 P.2d 924, wherein Mr. Justice Tobriner, Associate Justice of the Supreme Court of California, in referring to Burgett v. State of Texas, supra, said:

> We do not believe that the Supreme Court's description of the error as inherently prejudicial means that it can never be found "harmless beyond a reasonable doubt" within the meaning of *Chapman*, for the court apparently applied the *Chapman* test in *Burgett*. It did not state that because the error was inherently prejudicial it could never be deemed harmless, but instead stated that the error was inherently prejudicial and that "we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable

doubt' * * *." It did not foreclose the possibility that on another record presenting different facts it could conclude that such error was harmless. By describing the error as inherently prejudicial, the court may have meant only that such error is always to some extent harmful by reason of its essential character and is therefore different from error in the admission of other unconstitutionally obtained evidence that is not always harmful, such as, for example, innocent responses to an interrogation not preceded by required *Miranda* warnings. (Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [10 A.L.R.3d 974].) In this sense of 'inherently,' used as descriptive of the essential character of the error, commenting on a defendant's failure to testify is also inherently prejudicial. (See Griffin v. [State of] California (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.) Such error, however, may be found harmless under *Chapman*. Accordingly, we adhere to our holding in People v. Coffey, supra '[67 Cal.2d 204, 60 Cal.Rptr. 457, 430 P.2d 15,] that the introduction into evidence of an unconstitutional prior conviction is not prejudicial per se and therefore does not necessarily effect reversible error. Both the court's language in *Burgett* and the background provided by *Spencer* [v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606,] make clear, however, that only the most compelling showing can justify finding such error harmless beyond a reasonable doubt.

Retroactivity

There are two elements necessary to establish before the error herein may be regarded as reversible. First, that the error was not harmless within the standards of Chapman v. State of California, supra; and second, the rule must be regarded, within legal contemplation, as retroactive.

In view of the Court's express finding that the error complained of by petitioner resulted in harmless error, it is unnecessary to pass upon the issue of retroactivity.[22]

Accordingly, it is ordered that this petition for relief pursuant to 28 U.S.C. § 2255 must be, and hereby is,

Denied.

[22] The issues arising under the rationale of Burgett v. State of Texas, supra, are presented in the "Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc" in Shorter, Appellant, v. United States of America, Appellee, 412 F.2d 428, pending in the United States Court of Appeals for the Ninth Circuit (Cf. dissenting opinion of United States District Judge, Roger D. Foley, Jr., in Shorter v. United States, 412 F.2d 431, May 6, 1969).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(September 28, 1970)

Appeal from the United States District Court for the Northern District of California

Before HAMLEY and MERRILL, Circuit Judges, and THOMPSON, District Judge [1]

HAMLEY, *Circuit Judge:* Forrest S. Tucker appeals from a district court order denying his motion, made under 28 U.S.C. § 2255, to vacate the judgment convicting him of armed robbery and to set aside the sentence based thereon. The judgment and sentence of imprisonment for twenty-five years, entered on May 20, 1953, was affirmed by this court in *Tucker* v. *United States*, 214 F. 2d 713 (9th Cir. 1954). The district court opinion now under review in this section 2255 proceeding is reported in 299 F. Supp. 1376 (N.D. Cal. 1969).

After Tucker had testified in his 1953 trial for the armed robbery, the Government introduced evidence of his three prior felony convictions. This evidence was received for the purpose of impeaching Tucker's own testimony offering an alibi defense. In addition, after the jury had entered its verdict of guilty, the trial judge called for further information, in the form of a Federal Bureau of Investigation report concerning Tucker's prior convictions, for use in determining the sentence to be imposed.

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[1] The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

On June 10, 1966, the Superior Court of Alameda County, California, in case No. 25,174, set aside two of Tucker's prior convictions on the ground that "the defendant was neither advised of his rights to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." The Government concedes that these two prior felony convictions were invalid under *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963).

In this section 2255 proceeding Tucker argues that his 1953 conviction is invalid, under the rule of *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), because his prior uncounseled convictions were used at his trial to impeach his credibility and to influence the court in imposing sentence.

> In *Burgett*, the Supreme Court stated that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." 389 U.S. at 115.

This rule is being applied retroactively by this court and other court of appeals which have had occasion to consider the problem.[2]

The *Burgett* rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness. *Gilday* v. *Scafati*, ___ F. 2d ___ (1st Cir. 1970).[3]

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[2] See *Tucker* v. *Craven*, 421 F.2d 139 (9th Cir. 1970; *Gilday* v. *Scafati*, —— F.2d —— (1st Cir. 1970); *Smith* v. *Crouse*, 420 F.2d 373 (10th Cir. 1969); *Losieau* v. *Siegler*, 406 F.2d 795 (8th Cir. 1969); *Williams* v. *Coiner*, 392 F.2d 210 (4th Cir. 1968). The *Gilday* opinion contains a good statement of the reasons why *Burgett* should be applied retroactively.

[3] The question of whether *Burgett* precludes use of a prior conviction, invalid under *Gideon* v. *Wainwright*, to impeach a defendant's testimony in a subsequent trial on another charge, was argued in this court in *Shorter* v. *United States*, 412 F.2d 428 (9th Cir. 1969). However, in that case we did not decide the question because it was the defendant, and not the prosecution, who offered the evidence pertaining to a prior conviction.

We are also in agreement with the further ruling in *Gilday*, for the reasons there stated, that the reception of evidence pertaining to prior convictions, constitutionally erroneous under *Burgett* may, under the circumstances of a particular case, be harmless beyond a reasonable doubt, applying the principle announced in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Under *Chapman*, an error of constitutional proportions can be disregarded as harmless if the prosecution proves beyond a reasonable doubt that the error "did not contribute to the verdict obtained." 366 U.S. at 24.[4]

The nature of defendant's testimony at the trial, and the overwhelming weight of the testimony to the contrary are fully described in the district court opinion, 299 F. Supp. 1376, at 1377-1378. We agree with the district court that defendant's testimony was completely discredited by evidence other than that pertaining to the prior convictions. This leads us to conclude that the prosecution firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt.

As noted above, the evidence pertaining to Tucker's prior convictions was submitted not only to affect his credibility as a witness, but also to assist the trial court in fixing the sentence. The twenty-five year prison sentence imposed following Tucker's conviction for armed robbery, in violation of 18 U.S.C. § 2113(a) and (d), was the maximum allowable under the statute.

There is a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed. Therefore, as to the sentencing, we are unable

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[4] The *Chapman* court stated that there is little, if any, difference between this statement of the governing principle, and the statement in *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963) that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *See also, Harrington* v. *California*, 395 U.S. 250 (1969).

to conclude that the reception of such evidence was harmless beyond a reasonable doubt.

Accordingly, the judgment of conviction is affirmed, but the cause is remanded to the district court for resentencing without consideration of any prior convictions which are invalid under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

THOMPSON, D.J., Dissenting:

I respectfully dissent. This Court has not yet held that the rule of *Burgett* v. *Texas*, 389 U.S. 109 (1967), is applicable to constitutionally infirm convictions used for impeachment. This is the case in which it should be declared that a convicted person cannot attack his conviction on the ground that a constitutionally infirm prior conviction was used for impeachment. This Court has not yet held that the rule of *Burgett* v. *Texas*, *supra*, applies to invalidate a sentence where a constitutionally infirm prior conviction was called to the attention of the sentencing judge by presentence report, or otherwise, before sentence was imposed. This is the case in which it should be declared that a convicted defendant cannot attack the sentence imposed by showing that the sentencing judge was informed about a constitutionally infirm prior conviction.

This writer cannot believe that the Supreme Court intended such a broad interpretation and application of the *Burgett* rule. Viewed realistically, it means that the most hoary and ancient of the confirmed, repetitive recidivists may, by applying the "domino theory" whereby the earliest of the convictions is declared void by application of *Gideon*,[1] fell each of the ensuing convictions and establish a clean unsullied record of pro-social conduct.

It has been a fundamental of our case-made jurisprudence that the principles announced in pertinent precedent should be viewed and interpreted in the light of the facts of the particular case. This is a salutary principle which this writer believes has not been entirely

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[1] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

abandoned in contemporary jurisprudence. The principle recognizes the problems inherent in communication and expression, the difficulties of achieving pinpoint accuracy and the non-existence of words expressing exactly the same concept for the writer and the reader, the speaker and the listener. It recognizes the human frailty of inability of conceive, imagine and anticipate the applications which will be sought to be made of an announced principle, howsoever accurately expressed with semantic exactness. The principle also recognizes that judges are human beings and writing in favor of a position taken, however dispassionately, may become somewhat polemic in supporting the soundness of the decision advocated. This writer admires the genius of our system which contemplates a case by case review under differing sets of facts of the principles formulated and articulated in earlier precedents.

The majority opinion is based upon the following quotation from *Burgett* v. *Texas, supra.*

> To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto*, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The majority relies upon *Gilday* v. *Scafati*, —— F. 2d —— (1st Cir. 1970), where the First Circuit said:

> We conclude that the Burgett rule against use of uncounselled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of coun-

> sel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use "to prove guilt or enhance punishment." Finally, defendant's privilege to testify or not to testify—*Griffin* v. *California*, 380 U.S. 609, 614 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be admitted. We therefore hold that Burgett prevent the use of uncounseled convictions for purposes of impeachment.

I think the First Circuit and the majority of this Court rely on a too literal reading of the *Burgett* opinion in disregard of the principle I have urged that we should look to the facts and to what actually was decided. Narrowly, the holding of the *Burgett* case is that if void prior convictions are brought to the attention of the jury by the prosecution in a one-stage recidivist trial, the result is a denial of due process. In that situation, inasmuch as the enhancement of punishment is directly dependent upon the validity of the prior conviction, it is the absolute duty of the prosecution to assure itself of that validity.

My interpretation of *Burgett* is that the words "support guilt" refer to the situation where the prior conviction is an essential element of the crime charged. For examples, under federal law, it is unlawful for a felon to transport a firearm in interstate commerce (18 U.S.C. § 922) and under California law, it is an offense for a felon to come upon the grounds of a reformatory in the nighttime (CPC § 171(b)). In such cases, the status or condition of having suffered the prior felony conviction is essential to support the conviction and the prosecution, quite properly, is not permitted to rely upon a void conviction to establish such status. And when the prior conviction is "used against a person * * * to enhance punishment for another offense," the Supreme Court, in my view, was alluding to recidivist statutes like the one

involved in *Burgett* and like the Narcotics Drug Import and Export Act (21 U.S.C. § 174) and like the California Habitual Criminal Statute (CPC § 644). This is as far as I would now go in the application of *Burgett*, reserving, nevertheless, deference to the policy that it is worthwhile to consider future applications of the principle on a case-by-case basis.

In the present case, two prior felony convictions were used to impeach defendant at his federal armed robbery trial. These later turned out to be vulnerable under the *Gideon* principle. It is my thesis that this fact does not justify or support an attack upon the federal conviction. It seems to me that the position of the Majority. "[T]he Burgett rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness," constitutes an unwarranted extension of the *Burgett* decision and will involve state and federal courts in a morass of fruitless inquiry into the undiscernable prejudicial effect of such impeachment upon the trial as a whole. Further, the majority *sub silentio* overrules two decisions of this Court, *Bloch* v. *United States*, 238 F. 2d 631 (1956), and *Bloch* v. *United States*, 226 F. 2d 185 (1955), where the Court, in the first opinion, saw no error in a felony impeachment question asked by a prosecutor who knew the prior conviction was on appeal, and in the second affirmed the ruling despite the fact that the prior conviction had been reversed on appeal. Our Court there recognized that what really was in issue was the good faith of the prosecutor and that his use in good faith of a vulnerable prior conviction to impeach the defendant could not be relied upon to reverse the conviction. The same principle should be followed in the present case.

Moreover, I see no federal constitutional problem where the issue is properly analyzed as one of the prosecutor's good faith.

On the question of sentence, the factors involved are even more imponderable. The majority thinks the imposition of the maximum sentence shows that the priors were used to enhance sentence. In my experience, so

many factors affect the imposition of sentence that I cannot accept the premise. There never will be a case where a post-conviction remedy court will be a able to tell whether knowledge of one or more prior convictions affected the sentence unless the sentence given was mandated by statute so that the prior record could have no effect. In the present case, the sentencing judge conducted an extensive colloquy before imposing sentence. A portion is copied in the margin.[2] There is more, but

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[2] "The COURT. How old were you when you first suffered a conviction—17?

"The DEFENDANT. Yes, sir.

"The COURT. These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

"The DEFENDANT. I understand it does carry a heavy penalty.

"The COURT. Do you know the reason underlying it?

"The DEFENDANT. Yes, sir.

"The COURT. There is no room for the Court to entertain elements of great sympathy because you were armed on the occasion in question and you probably would have shot, had the occasion arose.

"The DEFENDANT. I have never been known to strike anybody, shoot anybody or harm anybody.

"Mr. KARESH. Could I ask the agent a question? Is there any evidence of violence in the past criminal record—I don't mean the bank robberies—any of these larcenies that you know of?

"The WITNESS. No, there is no actual shooting or anything of that nature.

"The COURT. How long has this association with Rick Bellew been going on, since 1951 and '52?

"The WITNESS. That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when we found out that he had served—he was serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

[Footnote continued on page 53]

it seems to me to be a fair analysis that the sentencing judge was influenced primarily by defendant's proneness to violence and the number of other outstanding charges

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[2] [Continued]

"The COURT. Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

"The WITNESS. I would say this, that on the local loan companies in the Oakland Area—

"The COURT. What kind of loan companies are they?

"The WITNESS. Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similar, in effect, of what was presented here, on those particular cases.

"The COURT. Do [you] have fingerprint testimony and the like?

"The WITNESS. I believe that there is, yes.

"The COURT. I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

"The WITNESS. Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

"The COURT. I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

"The WITNESS. I believe so.

"The COURT. All right, Do you have anything further?

"Mr. KARESH. No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

"The COURT. There is one count in the indictment?

"Mr. KARESH. Yes, Your Honor.

"The COURT. Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its Findings has indicated that the defendant did knowingly, willfully and unlawfully put in jeopardy the lives of the aforenamed employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

"Accordingly, Forrest Silva Tucker, are you ready for sentence?

"The DEFENDANT. I am.

"The COURT. It is the judgment and sentence of this Court that you will be confined in a Federal penitentiary for the term of 25 years.

"That is all."

than anything else.[3] It is not uncommon in my experience for a sentencing judge to take into consideration other charges pending (many times detainers have been placed for them) in enhancement of punishment and for other prosecuting officials to drop charges if a sufficiently substantial sentence is imposed. It is not even unusual for a defendant against whom a number of detainers have been lodged to request a substantial sentence with the hope that the other charges will be dropped. On the present record, it is pure speculation that the invalidated prior convictions had an effect on the sentence.

Finally, I would like to suggest that when we consider the use of prior convictions for impeachment or when they are included in a pre-sentence presentation as part of the defendant's prior history, it is not the conviction—the formality of conviction—that is important. It is the conduct that is represented by the conviction. The witness' veracity is not impeached by the conviction. The conviction is only shorthand for the impeaching misconduct, and a rule of convenience has been adopted which permits impeachment by the shorthand method but prohibits it by showing other acts of misconduct, else the trial would be led into endless by-ways and side controversies. Invalidating the prior conviction does not erase the conduct on which it was based. This is even clearer in the field of sentencing where a competent presentence report does not simply recite the prior criminal record but describes the circumstances of each charge—even those that led to an acquittal. It is this history that influences the sentencing judge, not the formal convictions. For example, in a recent case the defendant had been acquitted of the charge of murdering his mother. It, nevertheless, was proper for the sentencing judge to consider that incident where a loaded weapon was involved as bearing on defendant's proneness to violent activity. And in the present case, the

[3] My quotation from the sentencing colloquy is not to suggest that I think this post-conviction remedy court has a problem which warrants trying to dissect the mind of the sentencing judge. I merely wish to picture the kind of swamp we are getting ourselves bogged down in.

judge took into consideration conduct which had not yet been prosecuted to conviction—showing that it is the conduct, not the conviction, which is relevant. Many times the circumstances of a prior conviction will cause a court to discount and disregard it completely in imposing sentence.

These are additional reasons in support of my conclusion that the *Burgett* rule should be applied only where the formal record of conviction of a felony is essential to support guilt or to enhance punishment.

In the context of the foregoing, perhaps my earlier statement that the majority relies on a too literal reading of the quotation was incorrect. There the emphasis was on "support guilt" and "enhance punishment." But if the statement of principle in *Burgett* is read with strict literalness and the emphasis is placed on "to permit a *conviction* * * * to be used," then my conclusion, that it is the required use of the formal record of conviction to attain the result under attack that is important, is clearly correct.

The majority's treatment of the problems in this appeal is based on the necessary assumption that a federal constitutional issue of fair trial and due process of law is present whenever a jury or court is informed about a defendant's prior criminal record. Yet the decisions of the Supreme Court specifically refute this assumption: *Spencer* v. *Texas*,[4] 385 U.S. 554 (1967), where the procedure of a one-stage recidivist trial was affirmed; *Rundle* v. *Johnson*, 386 U.S. 14 (1967), where the procedure of admission of prior crimes in a one-stage murder trial

[4] "It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual-offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result."

to assist the jury in fixing punishment was affirmed. These decisions, viewed in association with *Burgett*, suggest that the broad application of the *Burgett* rule to impeachment evidence and sentencing information is not warranted and not intended. Cf. *United States* v. *Fay*, 409 F. 2d 564 (2nd Cir. 1969). While reference to dissenting opinions in support of a contention is apt to invoke ridicule, I believe the succinct dissent of three Justices in *Burgett* v. *Texas*, 389 U.S. 109 at 120, to be pertinent:

> The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer* v. *Texas*, 385 U.S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.

This approach to the problems reminiscent of the attitude of our Court in the *Bloch* cases, supra, although it was rejected by the majority of the Supreme Court in a true recidivist trial where the void prior conviction was an essential of the prosecutor's case, may nevertheless be revived to control judicial review in peripheral applications of the *Burgett* rule like the uses of it in this case.

I would affirm the District Court.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered Sept. 28, 1970.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Dept. No. 2; No. 25174

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

FORREST SILVA TUCKER, DEFENDANT

FINDINGS AND JUDGMENT OF COURT

On June 10, 1966 a hearing having been had before the above-entitled Court without a jury and evidence having been received as to the first prior conviction contained in the indictment, to wit, that on or about August 9, 1938 in the Circuit Court, Dade County, Florida, defendant was convicted of the felony of grand larceny and that in pursuance of said conviction served a term in a penal institution, and as the second prior conviction contained in the indictment, to wit, that on or about November 22, 1946 in the District Court, Orleans County, Louisiana, defendant was convicted of the felony of burglary and that in pursuance of said conviction served a term in a penal institution.

The Court hereby finds as to said first prior conviction and as to said second prior conviction that said Forrest Silva Tucker was not then and there informed of his right to the assistance of counsel and that said Forrest Silva Tucker did not then and there effectively waive his constitutional right to be represented by counsel.

NOW THEREFORE, it is ordered adjudged and decreed that the verdicts of the jury in the above-entitled cause filed on November 27, 1953 finding said first prior conviction and said second prior conviction to be true are vacated and set aside and said prior convictions contained in the indictment are dismissed.

It is further ordered, adjudged and decreed that the adjudication of December 2, 1953 that the above-named

defendant is an habitual criminal under subdivision a of Section 644 of the Penal Code of the State of California be and it is hereby set aside; said judgment of December 2, 1953, as modified by the District Court of Appeal of the State of California in and for the First Appellate District, Division Two thereof (People vs Forrest Silva Tucker: 127 Cal. App. 2d 436), shall otherwise remain in full force and effect.

Dated: June 10, 1966.

LEONARD DUDER
Judge of the Superior Court

SUPREME COURT OF THE UNITED STATES

No. 1389, October Term, 1970

UNITED STATES, PETITIONER

vs.

FORREST S. TUCKER

ORDER ALLOWING CERTIORARI

Filed May 3, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 441261 106

70-86

No. ~~1389~~

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST S. TUCKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OCTOBER TERM, 1970

—— No.

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST S. TUCKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case insofar as it remanded the cause for resentencing.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 431 F. 2d 1292.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 28, 1970. On December 19, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence imposed in 1953 must be vacated on the basis of a possibility that the sentencing judge took into account two prior convictions defective under the standards of *Gideon* v. *Wainwright*, 372 U.S. 335.

STATEMENT

In 1953 respondent was convicted of armed bank robbery in the United States District Court for the Northern District of California. The evidence against him included the testimony of four eyewitnesses and a fingerprint expert. Respondent testified in his own behalf that he was not in the vicinity of the savings and loan institution at the time of the robbery. On cross-examination government counsel elicited, for impeachment purposes, admissions of three prior state felony convictions—breaking and entering and theft of an automobile in Florida in 1938; burglary of a jewelry store in Louisiana in 1946; and armed robbery in Florida in 1950. Respondent also admitted escaping from a hospital en route to prison, after his 1950 sentence had commenced, and traveling to California under an assumed name.

Following the jury verdict, the court conducted a sentencing hearing. An FBI agent furnished information that respondent had been imprisoned for five years and four months on the 1938 conviction. The 1946 conviction brought a sentence of four years, but it was not known how much time was actually served. In 1950 respondent was sentenced to five years, but (as we have noted) escaped shortly after he began serv-

ice of that sentence. Other matters adduced at the sentencing hearing included respondent's marriage in September 1951; his background in Louisiana; the absence of verified gainful employment while in California; respondent's possession at the time of his arrest of a number of valuable assets, including an automobile and $700–$800 in cash; his wife's ignorance of his true identity and activities up until the time of his apprehension; his indictment in a pending state armed robbery case; and suspicions, informed by fingerprint evidence, that he had participated in several other local robberies involving finance companies or loan offices. Action in these last cases had been deferred pending the outcome of the present prosecution, and the court appears to have given them some weight in sentencing, App. A, *infra,* pp. 19–21; on the other hand, it stated that it would not take into consideration the armed robbery case already pending under indictment (Tr. 228).[1]

In July 1968 respondent filed a motion to vacate his sentence under 28 U.S.C. 2255. Underlying his motion was a ruling by the Superior Court of Alameda County, California in 1966[2] that respondent's 1938

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[1] We are lodging herewith a copy of the transcript of the 1953 trial and sentence proceedings.

[2] After respondent's federal conviction he was convicted in California on four counts of armed robbery. The 1938 and 1946 convictions were the basis for adjudging him an habitual criminal, thereby increasing his state sentence. More than 10 years later, shortly after this Court decided *Gideon* v. *Wainwright*, *supra*, respondent attacked the prior convictions in the state courts. In January, 1966 the Supreme Court of California ordered the Alameda County Court to redetermine re-

and 1946 convictions were defective under a retroactive application of *Gideon* v. *Wainwright,* 372 U.S. 335, because respondent had not been represented by counsel, and had not knowingly waived his right to counsel, at the trials which resulted in those convictions. The district court denied relief.

On appeal, the Court of Appeals for the Ninth Circuit concluded that there was error in the use of the prior convictions at trial and at sentencing. It went on to find that the use of the tainted convictions for impeachment at the trial was harmless beyond a reasonable doubt,[3] and therefore affirmed the conviction. With respect to the sentencing, however, the court of appeals found a reasonable probability that the defective prior convictions contributed to the imposition of the maximum possible term of imprisonment. It therefore remanded the case to the district court for resentencing without consideration of the invalid convictions. 431 F. 2d 1292–1294. One judge dissented, characterizing as "pure speculation" the holding that the invalidated prior convictions could have had an effect on respondent's federal sentence, and stressing that whether or not the convictions were invalidated, the conduct upon which they were

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spondent's status as an habitual criminal in light of *Gideon. In re Tucker*, 64 Cal. 2d 15, 409 P. 2d 921. After a hearing, the county court, on June 10, 1966, found the prior convictions defective, and withdrew the order decreeing appellant an habitual criminal (App. C).

[3] The court found that there was ample other evidence discrediting respondent's testimony, as well as abundant evidence of guilt.

based was still proper for consideration in imposing sentence.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is an unwarranted extension of this Court's decision in *Burgett* v. *Texas,* 389 U.S. 109. It places existing criminal sentences in doubt and portends a considerable expansion of Section 2255 proceedings to review sentencing issues. This presents an important question of federal law which has not been, but should be, decided by this Court.

Burgett involved a trial held after this Court's decision in *Gideon* v. *Wainwright,* 372 U.S. 335, under procedures permitting the prosecution to introduce evidence of prior convictions during trial in order to enhance sentence by proving recidivism. The prior conviction introduced in that case was constitutionally infirm, because the record of the conviction failed to satisfy the right-to-counsel standards recognized in *Gideon.* This Court reversed Burgett's conviction, finding the admission of his prior conviction "inherently prejudicial" and not harmless beyond a reasonable doubt.[4] The crux of the holding lies in the Court's statement that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the prin-

[4] The necessity for commenting upon the possibility of harmless error evidently resulted from the jury's fixing the defendant's sentence at ten years, fifteen less than the maximum even for a first conviction for the offense charged.

ciple of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

In this case, on the other hand, trial and sentencing occurred before this Court's decision in *Gideon*. Respondent's prior convictions were not used to prove either guilt or recidivism. As admitted in evidence to impeach, the defective prior convictions were correctly held to be of no consequence in the guilt-determining process. Cf. *Sigler* v. *Losieau*, 396 U.S. 988. In the sentencing process, they did not increase the maximum lawful punishment, but merely had an unassessable role as one of a number of factors considered by the trial judge in determining an appropriate sentence. In fact, the conduct underlying the prior convictions found defective below had been in effect admitted at the sentencing hearing.[5] We do not believe that the principle of *Burgett* requires a sentence that was properly imposed in the pre-*Gideon* era to be disturbed on such tenuous grounds.

A sentencing judge has wide latitude in determining an appropriate sentence, and the sentence ordinarily is not to be disturbed by an appellate court as long as it is within statutory bounds. The judge is, of course, not limited to rules of evidence fashioned for criminal trials; he is entitled and indeed encouraged to consider information derived from sources whom

[5] In a colloquy with the sentencing judge, respondent denied having committed only the last of the offenses underlying his three prior convictions (Tr. 229–230). He apparently was represented by counsel in the proceedings leading to that conviction.

the defendant has not necessarily confronted, as well as matter unrelated in any direct fashion to the crime upon which sentence is being imposed. *Williams* v. *New York,* 337 U.S. 241; *United States* v. *Onesti,* 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States* v. *Trigg,* 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U.S. 961; *Cross* v. *United States,* 354 F. 2d 512 (C.A.D.C.); *Arruda* v. *United States,* No. 24900, C.A. 9, decided April 21, 1970, certiorari denied, October 12, 1970 (No. 225, this Term). The criminal record which a judge may consider for sentencing purposes has never been thought limited to final convictions.

Although an ably counseled defendant might succeed in having certain charges dropped and in restricting the public airing of remaining charges by entering a guilty plea, a sentencing court is not precluded from considering the serious nature of criminal activity underlying either the withdrawn counts or those upon which the guilty plea was accepted. Similarly, laws which bar prosecution for stale offenses do not preclude their subsequent consideration in future sentencing proceedings. See *United States* v. *Doyle,* 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Onesti, supra; United States* v. *Cifarelli,* 401 F. 2d 512 (C.A. 2), certiorari denied, 393 U.S. 987. In other words, it is the defendant's actual past conduct, not his court-proven criminal responsibility, that the court takes into consideration in setting punishment that will "fit the offender and not merely the crime." *Williams* v. *New York,* 337 U.S.

241, 247. The subjective nature of this judgment, its multi-faceted character, and the resulting difficulty in ascertaining the motives for judicial action are all recognized in the rules which narrowly confine appellate review of sentencing.

In the light of these well accepted considerations, we believe that the court below exceeded its appellate function in reexamining the sentencing process that took place some seventeen years ago in this case, in a search for considerations whose sentencing impact might, in a contemporary case, be affected by intervening developments in the law. The fact that so important a principle as that established in *Gideon* is perhaps involved does not diminish the applicability of the principle that appellate courts do not intrude themselves into the subtle decisional process by which trial judges determine sentences for defendants tried before them. It is evident that the fact that counsel was denied in a case tried many years ago does not indicate that the defendant was not guilty of the acts for which he was tried; as we have noted, the respondent in this case had in fact not denied his guilt in those cases at the sentencing hearing, and it is of course his commission of the prior acts and not his conviction for them that was the pertinent consideration in fixing the sentence that is now in question. Thus the issue here is very different from that which motivated the *Burgett* decision, which properly denied legal effect to a formal *conviction* of an uncounselled defendant. And we believe that the decision below threatens not only excessive appellate intrusion into

the sentencing process but also an improper expansion of collateral proceedings under 28 U.S.C. 2255 as a vehicle for reexamination of sentencing processes.

The gravity and recurrent nature of this issue cannot be minimized. The court of appeals' decision applies in large part to multiple offenders convicted of serious crimes, whose criminal records commenced long before 1963, when *Gideon* was decided. *E.g.*, *Olvera* v. *Beto*, 429 F. 2d 131 (C.A. 5); *Gilday* v. *Scafati*, 428 F. 2d 1027 (C.A. 1); *Braun* v. *Rhay*, 416 F. 2d 1055 (C.A. 9).[6]

Often, the pertinent records of such prior pre-*Gideon* proceedings are inadequate, and the personnel who could furnish the answers unavailable. In such a situation, the courts have increasingly invoked the principle that waiver of counsel will not be presumed, and have therefore granted relief in other contexts. *Oswald* v. *Crouse*, 420 F. 2d 373 (C.A. 10); *Schram* v. *Cupp*, 425 F. 2d 612 (C.A. 9); *Smith* v. *Lane*, 426 F. 2d 767 (C.A. 7). Extension of this unavoidable problem to a whole new class of collateral proceedings for the reconstruction of the past mental processes of sentencing judges is, we submit, an unwarranted disruption of the judicial process that is not required

[6] In *Daegele* v. *Crouse*, 429 F. 2d 503 (C.A. 10), *Olvera* v. *Beto*, 429 F. 2d 131 (C.A. 5), *Haggard* v. *Tennessee*, 421 F. 2d 1384 (C.A. 6), and *Subilosky* v. *Massachusetts*, 412 F. 2d 691 (C.A. 1), the federal courts declined to resolve the substantive claims and instead ordered the habeas corpus petitioners to exhaust their state remedies first. These federal decisions provide a clear indication that the issue presented here will also arise in state courts.

for the vindication of the *Gideon* principle. Certainly, if a prior conviction has been used neither to invoke a recidivist statute nor in some similar way to enlarge the formal bounds of sentencing, its validity should not be open to question in collateral proceedings against a second sentence that was entirely proper when imposed. Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

FEBRUARY 1971.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(September 28, 1970)

Appeal from the United States District Court for the Northern District of California

Before HAMLEY and MERRILL, Circuit Judges, and THOMPSON, District Judge [1]

HAMLEY, *Circuit Judge:* Forrest S. Tucker appeals from a district court order denying his motion, made under 28 U.S.C. § 2255, to vacate the judgment convicting him of armed robbery and to set aside the sentence based thereon. The judgment and sentence of imprisonment for twenty-five years, entered on May 20, 1953, was affirmed by this court in *Tucker* v. *United States,* 214 F. 2d 713 (9th Cir. 1954). The district court opinion now under review in this section 2255 proceeding is reported in 299 F. Supp. 1376 (N.D. Cal. 1969).

After Tucker had testified in his 1953 trial for the armed robbery, the Government introduced evidence of his three prior felony convictions. This evidence

[1] The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

was received for the purpose of impeaching Tucker's own testimony offering an alibi defense. In addition, after the jury had entered its verdict of guilty, the trial judge called for further information, in the form of a Federal Bureau of Investigation report concerning Tucker's prior convictions, for use in determining the sentence to be imposed.

On June 10, 1966, the Superior Court of Alameda County, California, in case No. 25,174, set aside two of Tucker's prior convictions on the ground that "the defendant was neither advised of his rights to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." The Government concedes that these two prior felony convictions were invalid under *Gideon* v. *Wainwright,* 372 U.S. 335, 344–345 (1963).

In this section 2255 proceeding Tucker argues that his 1953 conviction is invalid, under the rule of *Burgett* v. *Texas,* 389 U.S. 109, 115 (1967), because his prior uncounseled convictions were used at his trial to impeach his credibility and to influence the court in imposing sentence.

> In *Burgett,* the Supreme Court stated that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." 389 U.S. at 115.

This rule is being applied retroactively by this court and other court of appeals which have had occasion to consider the problem.[2]

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[2] See *Tucker* v. *Craven*, 421 F. 2d 139 (9th Cir. 1970; *Gilday* v. *Scafati*, —— F. 2d —— (1st Cir. 1970); *Smith* v. *Crouse*, 420 F. 2d 373 (10th Cir. 1969); *Losieau* v. *Siegler*, 406 F. 2d 795 (8th Cir. 1969); *Williams* v. *Coiner*, 392 F. 2d 210 (4th Cir. 1968). The *Gilday* opinion contains a good statement of the reasons why *Burgett* should be applied retroactively.

The *Burgett* rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness. *Gilday* v. *Scafati*, F. 2d (1st Cir. 1970).[3]

We are also in agreement with the further ruling in *Gilday*, for the reasons there stated, that the reception of evidence pertaining to prior convictions, constitutionally erroneous under *Burgett* may, under the circumstances of a particular case, be harmless beyond a reasonable doubt, applying the principle announced in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Under *Chapman*, an error of constitutional proportions can be disregarded as harmless if the prosecution proves beyond a reasonable doubt that the error "did not contribute to the verdict obtained." 366 U.S. at 24.[4]

The nature of defendant's testimony at the trial, and the overwhelming weight of the testimony to the contrary are fully described in the district court opinion, 299 F. Supp. 1376, at 1377–1378. We agree with the district court that defendant's testimony was completely discredited by evidence other than that per-

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[3] The question of whether *Burgett* precludes use of a prior conviction, invalid under *Gideon* v. *Wainwright*, to impeach a defendant's testimony in a subsequent trial on another charge, was argued in this court in *Shorter* v. *United States*, 412 F. 2d 428 (9th Cir. 1969). However, in that case we did not decide the question because it was the defendant, and not the prosecution, who offered the evidence pertaining to a prior conviction.

[4] The *Chapman* court stated that there is little, if any, difference between this statement of the governing principle, and the statement in *Fahy* v. *Connecticut*, 375 U.S. 85, 86–87 (1963) that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *See also*, *Harrington* v. *California*, 395 U.S. 250 (1969).

taining to the prior convictions. This leads us to conclude that the prosecution firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt.

As noted above, the evidence pertaining to Tucker's prior convictions was submitted not only to affect his credibility as a witness, but also to assist the trial court in fixing the sentence. The twenty-five year prison sentence imposed following Tucker's conviction for armed robbery, in violation of 18 U.S.C. § 2113(a) and (d), was the maximum allowable under the statute.

There is a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed. Therefore, as to the sentencing, we are unable to conclude that the reception of such evidence was harmless beyond a reasonable doubt.

Accordingly, the judgement of conviction is affirmed, but the cause is remanded to the district court for resentencing without consideration of any prior convictions which are invalid under *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

THOMPSON, D.J., Dissenting:

I respectfully dissent. This Court has not yet held that the rule of *Burgett* v. *Texas,* 389 U.S. 109 (1967), is applicable to constitutionally infirm convictions used for impeachment. This is the case in which it should be declared that a convicted person cannot attack his conviction on the ground that a constitutionally infirm prior conviction was used for impeachment. This Court has not yet held that the rule of *Burgett* v. *Texas, supra,* applies to invalidate a sentence where a constitutionally infirm prior conviction was called

to the attention of the sentencing judge by pre-sentence report, or otherwise, before sentence was imposed. This is the case in which it should be declared that a convicted defendant cannot attack the sentence imposed by showing that the sentencing judge was informed about a constitutionally infirm prior conviction.

This writer cannot believe that the Supreme Court intended such a broad interpretation and application of the *Burgett* rule. Viewed realistically, it means that the most hoary and ancient of the confirmed, repetitive recidivists may, by applying the "domino theory" whereby the earliest of the convictions is declared void by application of *Gideon*,[1] fell each of the ensuing convictions and establish a clean unsullied record of pro-social conduct.

It has been a fundamental of our case-made jurisprudence that the principles announced in pertinent precedent should be viewed and interpreted in the light of the facts of the particular case. This is a salutary principle which this writer believes has not been entirely abandoned in contemporary jurisprudence. The principle recognizes the problems inherent in communication and expression, the difficulties of achieving pinpoint accuracy and the non-existence of words expressing exactly the same concept for the writer and the reader, the speaker and the listener. It recognizes the human frailty of inability of conceive, imagine and anticipate the applications which will be sought to be made of an announced principle, howsoever accurately expressed with semantic exactness. The principle also recognizes that judges are human beings and writing in favor of a position taken, however dispassionately, may become somewhat polemic in sup-

[1] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

porting the soundness of the decision advocated. This writer admires the genius of our system which contemplates a case by case review under differing sets of facts of the principles formulated and articulated in earlier precedents.

The majority opinion is based upon the following quotation from *Burgett* v. *Texas, supra.*

> To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Gweer* v. *Beto,* 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The majority relies upon *Gilday* v. *Scafati,* —— F. 2d —— (1st Cir. 1970), where the First Circuit said:

> We conclude that the Burgett rule against use of uncounselled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use "to prove guilt or enhance punishment." Finally, defendant's privilege to testify or not to testify—*Griffin* v. *California,* 380 U.S. 609, 614 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be

admitted. We therefore hold that Burgett prevent the use of uncounseled convictions for purposes of impeachment.

I think the First Circuit and the majority of this Court rely on a too literal reading of the *Burgett* opinion in disregard of the principle I have urged that we should look to the facts and to what actually was decided. Narrowly, the holding of the *Burgett* case is that if void prior convictions are brought to the attention of the jury by the prosecution in a one-stage recidivist trial, the result is a denial of due process. In that situation, inasmuch as the enhancement of punishment is directly dependent upon the validity of the prior conviction, it is the absolute duty of the prosecution to assure itself of that validity.

My interpretation of *Burgett* is that the words "support guilt" refer to the situation where the prior conviction is an essential element of the crime charged. For examples, under federal law, it is unlawful for a felon to transport a firearm in interstate commerce (18 U.S.C. § 922) and under California law, it is an offense for a felon to come upon the grounds of a reformatory in the nighttime (CPC § 171(b)). In such cases, the status or condition of having suffered the prior felony conviction is essential to support the conviction and the prosecution, quite properly, is not permitted to rely upon a void conviction to establish such status. And when the prior conviction is "used against a person * * * to enhance punishment for another offense," the Supreme Court, in my view, was alluding to recidivist statutes like the one involved in *Burgett* and like the Narcotics Drug Import and Export Act (21 U.S.C. § 174) and like the California Habitual Criminal Statute (CPC § 644). This is as far as I would now go in the application of *Burgett,*

reserving, nevertheless, deference to the policy that it is worthwhile to consider future applications of the principle on a case-by-case basis.

In the present case, two prior felony convictions were used to impeach defendant at his federal armed robbery trial. These later turned out to be vulnerable under the *Gideon* principle. It is my thesis that this fact does not justify or support an attack upon the federal conviction. It seems to me that the position of the Majority. "[T]he Burgett rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness," constitutes an unwarranted extension of the *Burgett* decision and will involve state and federal courts in a morass of fruitless inquiry into the undiscernable prejudicial effect of such impeachment upon the trial as a whole. Further, the majority *sub silentio* overrules two decisions of this Court, *Bloch v. United States,* 238 F. 2d 631 (1956), and *Bloch* v. *United States,* 226 F. 2d 185 (1955), where the Court, in the first opinion, saw no error in a felony impeachment question asked by a prosecutor who knew the prior conviction was on appeal, and in the second affirmed the ruling despite the fact that the prior conviction had been reversed on appeal. Our Court there recognized that what really was in issue was the good faith of the prosecutor and that his use in good faith of a vulnerable prior conviction to impeach the defendant could not be relied upon to reverse the conviction. The same principle should be followed in the present case.

Moreover, I see no federal constitutional problem where the issue is properly analyzed as one of the prosecutor's good faith.

On the question of sentence, the factors involved are even more imponderable. The majority thinks the

imposition of the maximum sentence shows that the priors were used to enhance sentence. In my experience, so many factors affect the imposition of sentence that I cannot accept the premise. There never will be a case where a post-conviction remedy court will be able to tell whether knowledge of one or more prior convictions affected the sentence unless the sentence given was mandated by statute so that the prior record could have no effect. In the present case, the sentencing judge conducted an extensive colloquy before imposing sentence. A portion is copied in the margin.[2] There is more, but it seems to me to be a

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[2] "The COURT. How old were you when you first suffered a conviction—17?

"The DEFENDANT. Yes, sir.

"The COURT. These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

"The DEFENDANT. I understand it does carry a heavy penalty.

"The COURT. Do you know the reason underlying it?

"The DEFENDANT. Yes, sir.

"The COURT. There is no room for the Court to entertain elements of great sympathy because you were armed on the occasion in question and you probably would have shot, had the occasion arose.

"The DEFENDANT. I have never been known to strike anybody, shoot anybody or harm anybody.

"Mr. KARESH. Could I ask the agent a question? Is there any evidence of violence in the past criminal record—I don't mean the bank robberies—any of these larcenies that you know of?

"The WITNESS. No, there is no actual shooting or anything of that nature.

"The COURT. How long has this association with Rick Bellew been going on, since 1951 and '52?

"The WITNESS. That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when we found out that he had served—he was

fair analysis that the sentencing judge was influenced primarily by defendant's proneness to violence and the number of other outstanding charges than anything

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serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

"The COURT. Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

"The WITNESS. I would say this, that on the local loan companies in the Oakland Area—

"The COURT. What kind of loan companies are they?

"The WITNESS. Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similiar, in effect, of what was presented here, on those particular cases.

"The COURT. Do [you] have fingerprint testimony and the like?

"The WITNESS. I believe that there is, yes.

"The COURT. I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

"The WITNESS. Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

"The COURT. I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

else.[3] It is not uncommon in my experience for a sentencing judge to take into consideration other charges pending (many times detainers have been placed for them) in enhancement of punishment and for other prosecuting officials to drop charges if a sufficiently substantial sentence is imposed. It is not even unusual for a defendant against whom a number of detainers have been lodged to request a substantial sentence with the hope that the other charges will be dropped. On the present record, it is pure speculation that the invalidated prior convictions had an effect on the sentence.

"The WITNESS. I believe so.

"The COURT. All right. Do you have anything further?

"Mr. KARESH. No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

"The COURT. There is one count in the indictment?

"Mr. KARESH. Yes, Your Honor.

"The COURT. Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its Findings has indicated that the defendant did knowingly, willfully and unlawfully put in jeopardy the lives of the aforenamed employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

"Accordingly, Forrest Silva Tucker, are you ready for sentence?

"The DEFENDANT. I am.

"The COURT. It is the judgment and sentence of this Court that you will be confined in a Federal penitentiary for the term of 25 years.

"That is all."

[3] My quotation from the sentencing colloquy is not to suggest that I think this post-conviction remedy court has a problem which warrants trying to dissect the mind of the sentencing judge. I merely wish to picture the kind of swamp we are getting ourselves bogged down in.

Finally, I would like to suggest that when we consider the use of prior convictions for impeachment or when they are included in a pre-sentence presentation as part of the defendant's prior history, it is not the conviction—the formality of conviction—that is important. It is the conduct that is represented by the conviction. The witness' veracity is not impeached by the conviction. The conviction is only shorthand for the impeaching misconduct, and a rule of convenience has been adopted which permits impeachment by the shorthand method but prohibits it by showing other acts of misconduct, else the trial would be led into endless by-ways and side controveries. Invalidating the prior conviction does not erase the conduct on which it was based. This is even clearer in the field of sentencing where a competent presentence report does not simply recite the prior criminal record but describes the circumstances of each charge—even those that led to an acquittal. It is this history that influences the sentencing judge, not the formal convictions. For example, in a recent case the defendant had been acquitted of the charge of murdering his mother. It, neverthless, was proper for the sentencing judge to consider that incident where a loaded weapon was involved as bearing on defendant's proneness to violent activity. And in the present case, the judge took into consideration conduct which had not yet been prosecuted to conviction—showing that it is the conduct, not the conviction, which is relevant. Many times the circumstances of a prior conviction will cause a court to discount and disregard it completely in imposing sentence.

These are additional reasons in support of my conclusion that the *Burgett* rule should be applied only where the formal record of conviction of a felony is essential to support guilt or to enhance punishment.

In the context of the foregoing, perhaps my earlier statement that the majority relies on a too literal reading of the quotation was incorrect. There the emphasis was on "support guilt" and "enhance punishment." But if the statement of principle in *Burgett* is read with strict literalness and the emphasis is placed on "to permit a *conviction* * * * to be used," then my conclusion, that it is the required use of the formal record of conviction to attain the result under attack that is important, is clearly correct.

The majority's treatment of the problems in this appeal is based on the necessary assumption that a federal constitutional issue of fair trial and due process of law is present whenever a jury or court is informed about a defendant's prior criminal record. Yet the decisions of the Supreme Court specifically refute this assumption: *Spencer* v. *Texas,*[4] 385 U.S. 554 (1967), where the procedure of a one-stage recidivist trial was affirmed; *Rundle* v. *Johnson,* 386 U.S. 14 (1967), where the procedure of admission of prior crimes in a one-stage murder trial to assist the jury in fixing punishment was affirmed. These decisions, viewed in association with *Burgett,* suggest that the broad application of the *Burgett* rule to impeach-

[4] "It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual-offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result."

ment evidence and sentencing information is not warranted and not intended. Cf. *United States* v. *Fay*, 409 F. 2d 564 (2nd Cir. 1969). While reference to dissenting opinions in support of a contention is apt to invoke ridicule, I believe the succinct dissent of three Justices in *Burgett* v. *Texas*, 389 U.S. 109 at 120, to be pertinent:

> The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer* v. *Texas*, 385 U.S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.

This approach to the problems reminiscent of the attitude of our Court in the *Bloch* cases, supra, although it was rejected by the majority of the Supreme Court in a true recidivist trial where the void prior conviction was an essential of the prosecutor's case, may nevertheless be revived to control judicial review in peripheral applications of the *Burgett* rule like the uses of it in this case.

I would affirm the District Court.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGEMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered Sept. 28, 1970.

APPENDIX C

In the Superior Court of the State of California in and for the County of Alameda

Dept. No. 2; No. 25174

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

FORREST SILVA TUCKER, DEFENDANT

FINDINGS AND JUDGMENT OF COURT

On June 10, 1966 a hearing having been had before the above-entitled Court without a jury and evidence having been received as to the first prior conviction contained in the indictment, to wit, that on or about August 9, 1938 in the Circuit Court, Dade County, Florida, defendant was convicted of the felony of grand larceny and that in pursuance of said conviction served a term in a penal institution, and as the second prior conviction contained in the indictment, to wit, that on or about November 22, 1946 in the District Court, Orleans County, Louisiana, defendant was convicted of the felony of burglary and that in pursuance of said conviction served a term in a penal institution.

The Court hereby finds as to said first prior conviction and as to said second prior conviction that said Forrest Silva Tucker was not then and there informed of his right to the assistance of counsel and that said Forrest Silva Tucker did not then and there effectively waive his constitutional right to be represented by counsel.

NOW THEREFORE, it is ordered adjudged and decreed that the verdicts of the jury in the above-entitled cause filed on November 27, 1953 finding said first prior conviction and said second prior conviction to be true are vacated and set aside and said prior convictions contained in the indictment are dismissed.

It is further ordered, adjudged and decreed that the adjudication of December 2, 1953 that the above-named defendant is an habitual criminal under subdivision a of Section 644 of the Penal Code of the State of California be and it is hereby set aside; said judgment of December 2, 1953, as modified by the District Court of Appeal of the State of California in and for the First Appellate District, Division Two thereof (People vs Forrest Silva Tucker: 127 Cal. App. 2d 436), shall otherwise remain in full force and effect.

Dated: June 10, 1966.

LEONARD DUDER,
Judge of the Superior Court.

U.S. GOVERNMENT PRINTING OFFICE: 1971

No. 70-86

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST S. TUCKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 45–56) is reported at 431 F. 2d 1292.

JURISDICTION

The judgment of the court of appeals (App. 57) was entered on September 28, 1970. The petition for a writ of certiorari was filed on Feb. 24, 1971, and granted on May 3, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence imposed in 1953 must be vacated because the sentencing judge was aware of

two prior convictions which were defective under the standards established in 1963 in *Gideon* v. *Wainwright,* 372 U.S. 335.

STATEMENT

1. In 1953 respondent was convicted of armed bank robbery in the United States District Court for the Northern District of California. The robbery occurred on December 7, 1951. The evidence against respondent included the testimony of four eyewitnesses, who identified him at trial and at a lineup, and a fingerprint expert, who identified a print found on a teller's cash box as belonging to respondent (App. 1–21). Respondent testified in his own behalf that he was not in the vicinity of the victimized savings and loan institution at the time of the robbery, but had been there two days before to change a fifty dollar bill. On cross examination, government counsel elicited, for purposes of impeachment, admissions of three prior state felony convictions—breaking and entering and theft of an automobile in Florida in 1938; burglary of a jewelry store in Louisiana in 1946; and armed robbery in Florida in 1950. Following the third conviction respondent was hospitalized for removal of his appendix. After he had recovered from the effects of the operation and was waiting to be transported to prison, respondent escaped from the hospital and traveled to California under an assumed name (App. 24–26).

Following the jury verdict, the court conducted a sentencing hearing. An FBI agent furnished information that respondent had been imprisoned for five

years and four months on the 1938 conviction (App. 28–29). The 1946 conviction brought a sentence of four years, but it was not known how much time was actually served (App. 30). In 1950 respondent was sentenced to five years, but (as noted) escaped shortly after he began service of that sentence. Other matters adduced and considered at the sentencing hearing included respondent's background in Louisiana; his marriage in September 1951 and his wife's ignorance of his true identity and activities until the time of his apprehension; respondent's possession at the time of his arrest of a number of valuable assets, including two expensive automobiles and $700–$800 in cash, in spite of his not having been gainfully employed while in California; his indictment in a pending state armed robbery case; and suspicions, supported by fingerprint evidence, that he had participated in several other local robberies involving finance companies or loan offices. Action in these cases had been deferred pending the outcome of the prosecution (App. 30–37). The court stated that it would not take into consideration the armed robbery case already pending under indictment (App. 36), and sentenced respondent to the maximum term of twenty-five years imprisonment.[1]

2. In July 1968 respondent filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. Underlying his motion was a ruling by the Superior Court of Ala-

[1] A copy of the transcript of the 1953 trial and sentencing proceedings has been lodged with this Court.

meda County, California in 1966[2] that respondent's 1938 and 1946 convictions were defective under a retroactive application of *Gideon* v. *Wainwright,* 372 U.S. 335, because respondent had not been represented by counsel at the time of those convictions (App. 58–59). The district court denied relief.

On appeal, the Court of Appeals for the Ninth Circuit concluded that there was error in the use of the prior convictions at trial and at sentencing. As to the trial, the court found that the use of the tainted convictions for impeachment was harmless beyond a reasonable doubt in view of the other ample evidence discrediting respondent's testimony, as well as the abundant evidence of guilt. It therefore affirmed the conviction. With respect to the sentencing, however, the court of appeals found a reasonable probability

[2] After respondent's federal conviction he was convicted in California on four counts of armed robbery. The 1938 and 1946 convictions were the basis for adjudging him a "habitual criminal", thereby increasing his state sentence under California law. More than 10 years later, shortly after this Court decided *Gideon* v. *Wainwright*, *supra*, respondent attacked the prior convictions in the state courts. In January, 1966, the Supreme Court of California ordered the Alameda County Court to redetermine respondent's status as a habitual criminal in light of *Gideon*. *In re Tucker*, 64 Cal. 2d 15, 409 P. 2d 921. After a hearing, the county court, on June 10, 1966, found the prior convictions defective, and withdrew the order decreeing respondent a habitual criminal. Respondent then filed a petition for a writ of habeas corpus in the federal district court, alleging that the introduction of the prior convictions tainted the jury's determination of his guilt as to the four robbery counts. The district court denied relief, but the Ninth Circuit reversed and remanded. *Tucker* v. *Craven*, 421 F. 2d. 139. A retrial is imminent.

that the defective prior convictions contributed to the imposition of the maximum possible term of imprisonment. It therefore remanded the case to the district court for resentencing without consideration of the invalid convictions (App. 45–48). One judge dissented, characterizing as "pure speculation" the holding that the invalidated prior convictions could have had an effect on respondent's federal sentence, and stressing that, whether or not the convictions were invalidated, the conduct upon which they were based was properly considered in imposing sentence (App. 48–56).

SUMMARY OF ARGUMENT

I. In requiring the district court to reconsider respondent's sentence, the court of appeals failed to take account of the sentencing judge's extremely broad discretion to consider any reliable information in determining an appropriate sentence. The safeguards developed to protect defendants while their guilt or innocence is being determined are simply not necessary in the sentencing stage. Furthermore, the sentencing judge is not required to spell out with precision the factors which have influenced his determination; therefore, the sentence he imposes is not ordinarily subject to appellate review. If courts of appeal were authorized to require reassessment of the sentence imposed by the sentencing judge whenever they did not approve of a sentence, judges who had never been required to list and evaluate the factors which weighed upon their decision in sentencing would be confronted years later with an artificial proceeding seeking to reexamine their mental processes. Indeed,

in many instances, the original sentencing judge would no longer be available.

One of the major factors in the sentencing judge's determination is the defendant's prior criminal conduct. As in other areas, the judge may consider any reliable evidence of the defendant's criminal conduct, whether or not that conduct has resulted or will result in conviction, because for ordinary sentencing purposes, the relevant inquiry is not whether the defendant has been formally convicted of past crimes, but rather, as here, whether he has in fact engaged in criminal conduct, and if so, how extensive that conduct has been. The judge's evaluation of the defendant's pattern of conduct is usually unaffected by subsequent invalidation of convictions.

Burgett v. *Texas,* 389 U.S. 109, relied upon by the court of appeals, is not inconsistent with this principle, because there the fact of conviction itself, as opposed to the fact of the underlying conduct, affected the minimum and maximum sentences that the jury could impose. In this case, the invalidated convictions did not increase the minimum or maximum lawful punishment, but merely became elements in the large number of factors considered by the trial judge in determining an appropriate sentence. Furthermore, *Burgett* postdated this Court's decision in *Gideon* v. *Wainright,* 372 U.S. 335, so that the trial judge there should not have treated the earlier convictions as valid. Here the sentencing judge acted in accord with prevailing constitutional doctrine. Since prior convictions are typically known to the sentencing judge,

a ruling that this sentence must be reopened would require the reopening of a vast number of sentences.

II. There is no need to reassess the sentence imposed in this case, because there is no indication that the invalidation of the prior convictions cast any doubt on the conduct underlying those convictions. At no time during the sentencing proceeding did respondent suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated, though he did deny having committed the other offense of which he had been convicted. Furthermore, there were numerous factors which might have induced the trial judge to impose a severe sentence on respondent. In these circumstances, it is unlikely that the sentencing judge would have imposed a different sentence if he had known that respondent's convictions would be invalidated.

ARGUMENT

I

THE INVALIDATION OF TWO OF RESPONDENT'S PRIOR CONVICTIONS DOES NOT COMPEL THE SENTENCING COURT TO REASSESS THE ORIGINAL SENTENCE

In requiring the district court to reconsider respondent's sentence eighteen years after its imposition because of the invalidity of two prior convictions which were known to the sentencing judge at the original sentencing proceeding, the court of appeals disregarded two well settled principles of sentencing procedure. First, the court did not take account of the extremely wide latitude accorded a sentencing

judge in the consideration of matters which may influence his decision to assess a particular sentence. In addition, the brief majority opinion failed to recognize that it is the fact of the defendant's prior conduct, not the formal fact of conviction, which is relevant to the sentencing process.

A. THE SENTENCING JUDGE HAS BROAD DISCRETION TO CONSIDER ANY MATTERS WHICH HE DEEMS RELEVANT TO THE IMPOSITION OF A SUITABLE SENTENCE

The most characteristic aspect of sentencing procedure is that the sentencing judge may secure the information used to determine a sentence from any reliable source, and is not in any way bound by rules of evidence fashioned for criminal trials. The nature of the evidence he can consider is almost limitless, as long as it is reliable; he is entitled, and indeed encouraged, to consider information derived from sources whom the defendant has not necessarily confronted, as well as matter unrelated to the crime upon which sentence is being imposed. *Williams* v. *New York,* 337 U.S. 241; *United States* v. *Onesti,* 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States* v. *Trigg,* 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U.S. 961; *Cross* v. *United States,* 354 F. 2d 512 (C.A. D.C.); *Arruda* v. *United States,* No. 24900, C.A. 9, decided April 21, 1970, certiorari denied, 400 U.S. 822. And once the sentence is determined within statutory bounds, it will not be disturbed on appeal except for the most compelling reasons. *Gore* v. *United States,* 357 U.S. 386, 393; *Williams* v. *New York,* 337 U.S. 241; *Scott* v. *United States,* 419 F. 2d

264, 266 (C.A. D.C.); *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838; cf. *Townsend* v. *Burke*, 334 U.S. 736.

The rationale for this broad discretion is readily apparent, particularly in the federal courts where the sentencing proceeding is conducted solely by a judge. The safeguards developed to protect defendants while their guilt or innocence is being determined by a jury of laymen are not essential in the sentencing stage; indeed, they would inhibit the judge's attempt to arrive at a penalty that will "fit the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247. Because the sentencing judge must fit the punishment to the offender, the offenses and the needs of the community,[3] he necessarily makes a complex judgment, based on all the information available to him. Unlike the appellate courts, he has been able to observe the defendant personally—in most instances during the course of trial as well as at the hearing on the sentence. For these reasons, the appellate courts may not substitute their own assessment of the proper punishment for the one imposed by the sentencing judge. *Blockburger* v. *United States*, 284 U.S. 299, 305.

Furthermore, the sentencing judge is not required to spell out with precision those factors which have influenced his determination of the extent of punishment. For this reason, a court of appeals should not

[3] See National Probation and Parole Association, *Guides for Sentencing* (1957), ch. 4; Thomsen, *Sentencing the Dangerous Offender*, 32 Fed. Prob. 3.

ordinarily review the record to determine which particular factors might have strongly influenced the final assessment. Such a speculative search of the record may well result, as here, in the upheaval of sentences imposed long ago, requiring the sentencing judge to make a reassessment at a time when the setting in which sentence was imposed cannot fairly be reconstructed. Since all of the items which influenced the judge at the time of sentence are not likely to have been recorded, courts which have never been required to list and evaluate the factors which weighed upon their decision in sentencing are confronted years later with an artificial collateral proceeding seeking to reexamine their mental calculations. The problem of reconstruction will be even more difficult when, as will often be the case, the judge originally imposing sentence is no longer sitting and a different judge, without an extensive first hand observation of defendant, must decide upon an appropriate sentence (see page 17, note 10 *infra*).

B. THE SUBSEQUENT INVALIDATION OF A PRIOR CONVICTION DOES NOT NECESSARILY REQUIRE RECONSIDERATION OF A SENTENCE BASED IN PART UPON TH OFFENSE LEADING TO THAT CONVICTION, BECAUSE IT IS THE DEFENDANT'S CONDUCT ITSELF, NOT THE LEGAL CONSEQUENCE THEREOF, THAT BEARS UPON THE SENTENCE

One of the major factors which the sentencing judge takes into consideration in imposing a suitable sentence is the defendant's prior criminal conduct. And it has never been thought that the criminal record which a judge may consider for sentencing purposes is limited to final convictions. Indeed, it has long been

recognized that a sentencing judge may examine any reliable evidence of criminal conduct whether or not it has resulted—or will result—in conviction.[4] *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Onesti*, 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States* v. *Cifarelli*, 401 F. 2d 512 (C.A. 2), certiorari denied, 393 U.S. 987; see also *United States* v. *Eberhardt*, 417 F. 2d 1009 (C.A. 4), certiorari denied *sub nom. Berrigan* v. *United States*, 397 U.S. 909. The judge's broad discretion in this area is in part an aspect of his generally wide latitude to hear any relevant evidence in a sentencing proceeding. It is also a reflection of the fact that for ordinary sentencing purposes, the relevant inquiry is not whether the defendant has been formally convicted of past crimes, but rather, as here, whether he has in fact engaged in criminal conduct, and if so, how extensive that conduct has been. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 723; *Cross* v. *United States*, 354 F. 2d 512, 514 (C.A. D.C.). The judge's evaluation of the defendant's "pattern of behavior," *Neely* v. *Quatsoe*, 317 F. Supp. 40 (E.D. Wis.), is usually unaffected by subsequent invalidation of convictions.

If the sentencing judge were not authorized to examine unproved criminal activity, an ably counselled

[4] See Parsons, *Aids in Sentencing*, 35 F.R.D. 423, for an extensive discussion on matters which a sentencing judge can review and two sample presentence reports. In one of the reports the draftsman notes that the subject has no convictions, but eight arrests for minor offenses and has another case pending in a state court, 35 F.R.D. at 445–449.

defendant might succeed in shielding from the judge the facts underlying serious charges which have been dropped as a result of prosecutorial discretion or because a plea of guilty to other counts had been entered. Similarly, offenses barred by stale claims statutes would not be taken into account, although they should be. Moreover, a judge would have to refrain from considering the facts of charges then pending, no matter how recent the underlying conduct and how certain it appeared that defendant had engaged in the conduct. These restrictions would obviously make it much more difficult for the judge to determine a sentence on a realistic basis.

There are, of course, circumstances in which the fact of prior conviction itself has a legal consequence which must be eradicated when the conviction is subsequently held invalid. In some state jurisdictions, for example, the length of sentence for certain criminal offenses is automatically affected by the fact that a defendant has been convicted of prior offenses. In these circumstances, the invalidation of the relevant conviction justifies relief from the dependent sentence. *E.g., United States* v. *Garelle,* 438 F. 2d 366 (C.A. 2), certiorari dismissed, 401 U.S. 967; compare *Schram* v. *Cupp,* 425 F. 2d 612 (C.A. 9).

Indeed, this was precisely the situation before the Court in *Burgett* v. *Texas,* 389 U.S. 109, relied upon by the court below. *Burgett* involved a trial held after this Court's decision in *Gideon* v. *Wainwright,* 372 U.S. 335, under procedures permitting the prosecution to introduce evidence of prior convictions dur-

ing trial in order to enhance sentence by proving recidivism.[5] The sentence in *Burgett* was to be determined by the jury; both the minimum and maximum term it could impose was greater if it found the defendant to be a recidivist. The prior conviction introduced in that case was constitutionally infirm, because the record of the conviction failed to satisfy the right-to-counsel standards recognized in *Gideon*. This Court reversed Burgett's conviction, finding the admission of his prior conviction "inherently prejudicial" and not harmless beyond a reasonable doubt.[6] The crux of the holding lies in the Court's statement that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright,* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

We submit that the rationale of *Burgett* does not apply to this case. Respondent's prior convictions were not used to prove either guilt or recidivism. As admitted in evidence to impeach, the defective prior convictions were correctly held to be of no consequence

[5] The minimum penalty for a first offense in *Burgett* was two years; Burgett had been sentenced to ten years. See 389 U.S. at 110, n. 1.

[6] The necessity for commenting upon the possibility of harmless error evidently resulted from the jury's fixing the defendant's sentence at ten years, fifteen less than the maximum even for a first conviction for the offense charged.

in the guilt-determining process. Cf. *Sigler* v. *Losieau*, 396 U.S. 988. In the sentencing process, they did not increase the maximum lawful punishment, but merely became elements in the large number of factors considered by the trial judge in determining an appropriate sentence. The actions which underlay the convictions could, as noted above, have properly been taken into account in sentencing even if respondent had never been prosecuted for them. We do not believe that the principle of *Burgett* requires a sentence to be disturbed on such tenuous grounds.

A separate reason for not extending *Burgett* to these circumstances is that the trial in *Burgett* postdated *Gideon*, and the trial judge there should not have treated the earlier conviction as valid. Here the sentencing judge acted in accord with prevailing constitutional doctrine. Since prior convictions are typically known to the sentencing judge, a ruling that this sentence must be reopened would require the reopening of a vast number of sentences. Whenever persons had once been convicted in a manner inconsistent with present constitutional interpretations that are retroactively applied, see *e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *United States* v. *United States Coin and Currency*, 401 U.S. 715, virtually every subsequent sentence imposed between their conviction and the time of announcement of the new doctrine would be invalid. Such a rule, reaching to the most hypothetical side effects of a conviction, would go far beyond the ordinary rule of retroactivity.

II

THE SENTENCE IMPOSED IN THIS CASE SHOULD NOT BE REASSESSED, BECAUSE THERE IS NO INDICATION THAT THE INVALIDATION OF THE PRIOR CONVICTIONS CAST ANY DOUBT ON THE CONDUCT UNDERLYING THOSE CONVICTIONS

Whatever the appropriate rule in a case in which the invalidation of a prior conviction might bring into doubt the fact of the prior criminal conduct itself, and in which the information before the sentencing judge did not include numerous other factors which might have led him to impose a severe sentence, a sentence should not be reopened when, as here, both these factors are absent.

At trial the prosecution, on cross-examination of respondent, inquired about three prior convictions. Respondent stated that in 1938, at the age of 17, he had been convicted of breaking into a garage, stealing an automobile therefrom, and going on a joy ride. He then described his second offense as a burglary of a New Orleans jewelry store, and his third offense, which was not invalidated,[7] as an armed robbery committed in 1950. At no time during the trial or during the sentencing proceeding did respondent suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated; significantly in his colloquy with the sentencing

[7] This offense was not involved in the decision by the California court invalidating the other convictions, because it had not been listed in the state indictment (see App. 58–59).

judge (App. 35), respondent denied having committed the 1950 armed robbery, but not the other two offenses. In these circumstances, we submit that the sentencing judge is not likely to have attached any measurable significance to the invalidation of the first two convictions even if he had known at that time that the convictions were constitutionally infirm.[8]

We note, finally, that in addition to the invalidated convictions there were numerous other factors which might have induced the trial judge to impose a severe sentence on respondent. At the sentencing hearing, Judge Harris examined respondent's background and life style in great detail. He heard evidence that respondent had an alias, that he had married a girl who remained totally unaware of his true identity and means of furnishing income, and that he had accumulated valuable assets in spite of never having been gainfully employed. He also considered the 1950 offense for which respondent had counsel,[9] and for which the conviction was never held invalid,[2] and several pending state charges for which respond-

[8] We recognize that for purposes of retroactivity, this Court has stated that the right to counsel guaranteed by *Gideon* is a right whose denial may affect the accuracy of a conviction. See, *e.g.*, *Tehan* v. *Shott*, 382 U.S. 406 416. We do not believe, however, that these holdings imply that the accuracy of convictions obtained against defendants without counsel ought to be doubted in all contexts. In this case, for example, where respondent has never denied the accuracy of the relevant convictions and where these convictions have been only one of numerous factors considered in the imposition of the sentence, we do not believe that the rationale of the retroactivity cases should apply. Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

[9] We were informed of respondent's having had counsel at this proceeding by the clerk of the Criminal Court of Records of Dade County, Florida.

ent was later convicted (*supra*, n. 2). Thus even if the judge had been less than entirely certain that the subsequently invalidated convictions were accurate, it is unlikely that this would have had a significant impact on his sentencing decision. Consequently, there is no reason here to burden the district court with the task of making an artificial, unrealistic evaluation of the weight which he attached in 1953 to the fact of respondent's conviction for the offenses in question.[10]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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AUGUST 1971.

[10] It happens that in this case the same district judge who imposed sentence in 1953, Judge Harris, was still on the bench sixteen years later when respondent moved to vacate his sentence. See *Tucker* v. *United States*, 299 F. Supp. 1376 (N.D. Cal.). Judge Harris' written opinion responds solely to the assertion by respondent at that time, that the use of the prior defective convictions for impeachment purposes was reversible error. Although Judge Harris did not discuss the sentencing process, it is likely that if he thought the fact of conviction influenced his sentence, he would have so stated.

U.S. GOVERNMENT PRINTING OFFICE: 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-86

UNITED STATES OF AMERICA,

Petitioner,

v.

FORREST S. TUCKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT TUCKER

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BRIEF FOR RESPONDENT TUCKER

OPINION BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 431 F.2d 1292 (1970).

JURISDICTION

This court has jurisdiction under 28 U.S.C. 1254 (1), the timely petition of the United States for writ of certiorari having been granted on May 3, 1971.

QUESTION PRESENTED

Whether the Court of Appeals properly directed the district court judge to reconsider respondent's sentence after proceedings under 28 U.S.C. 2255 disclosed that two of three prior convictions which the judge had considered in imposing the maximum punishment were invalid because of denial of counsel.

STATEMENT OF THE CASE

In 1953 respondent Tucker was tried in federal district court on a charge of robbery of a Berkeley, California, bank. The only persons in the bank at the time of the crime were four female employees (App. 16, 17), three of whom testified about the event. Their testimony disclosed that the robbery was conducted without violence and without any force or infliction of harm (e.g., App. 5, 11-12, 21). The robber had a gun, but apparently did not point it at anyone, for each of the employee witnesses testified merely that he "showed" the gun to her (App. 4, 10, 20). Tucker testified on his own behalf, denying that he was the robber. He was impeached by three prior felony convictions (App. 24-26).

The jury returned a verdict of guilty, and a sentencing hearing was conducted before the judge. F.B.I. agent Poole testified as to respondent's prior criminal record as follows:

1. In 1938 respondent, then 17, was convicted in Florida of grand larceny and breaking and entering. His sentence was ten years, of which he served seven years, including more than five of a "chain gang" (App. 28-29).
2. In 1946 respondent was convicted in Louisiana of burglary and sentenced to four years in prison (App, 30).
3. In 1950 in Florida respondent was convicted of burglary and given a five year term of imprisonment (App. 30).

It was brought out that respondent was also then a suspect in several robberies in Northern California and under indictment for robbery in Los Angeles, but the prosecutor emphasized that

> "... I bring this out ... not because since he [respondent] has been found guilty that that should be taken into account in increasing punishment, but I only tell you so that Your Honor will know that perhaps he will face other charges." (App. 31.)[1]

The following exchange also occurred at the sentencing hearing:

> "MR. RUST [defense counsel]: ... I am just wondering how much the Court should take into consideration of these pending charges—which the Court has no way of knowing the truth or falsity of.
>
> "THE COURT [District Judge Harris]: I am not going to take into consideration in the matter of sentence the Los Angeles case because that will be dealt with appropriately. Either he will be acquitted or convicted." (App. 34)[2]

Respondent himself asked Judge Harris to consider that he had never previously been given probation or a suspended sentence and had previously served seven years on his first Florida conviction and over 3½ years on the Louisiana conviction. (App. 35).

The judge pronounced sentence of 25 years imprisonment—the statutory maximum. (App. 37). 18 U.S.C. 2113 (a) and (d) (up to 25 years for robbery with dangerous weapon). While the record does not directly reveal the

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[1]That is, the prosecutor did not view the unadjudicated charges as factors militating in favor of a lengthy sentence.

[2]Of the anticipated prosecutions of respondent in Northern California the judge said: "I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases." (App. 37.)

judge's reasons for imposing the maximum sentence, his remark to defense counsel concerning the pending Los Angeles charge makes it apparent that the judge would give little or no weight to charges on which a defendant's guilt or innocence had yet to be adjudicated.

Shortly thereafter respondent was convicted in a California court of multiple counts of robbery. These convictions, however, were collaterally attacked by respondent and set aside.[3] Respondent advises that there are no outstanding criminal charges against him. Since respondent has already served 18 years imprisonment for the Berkeley bank robbery, there is a substantial likelihood that reconsideration of his sentence will result in his release from confinement.

The proceeding now before this Court arose under 28 U.S.C. 2255 when respondent moved the district court to vacate his 1953 sentence of 25 years on the ground that two of the prior convictions that were before the court in 1953 were invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is conceded that, as the California courts determined in 1966 (App. 58-59), respondent's 1938 Florida conviction and his 1946 Louisiana conviction were obtained in violation of due process and are void because in both instances respondent was denied the assistance of counsel.[4]

---

[3]See *Tucker v. Craven*, 421 F.2d 139 (9th Cir. 1970), cert. den. 398 U. S. 929 (1970). Respondent has furnished counsel with a copy of the state court order dismissing the charges (compare Brief for United States, p. 4 n. 2), which is appended hereto as Exhibit A.

[4]The validity of respondent's third conviction—in Florida in 1950—is not at issue. The United States, however, asserts that respondent did have counsel at the 1950 proceeding. (Brief for United States, p. 16 n. 9.) Respondent has advised his attorneys that in the 1950 Florida proceeding he specifically asked the judge to appoint counsel for him because of his indigence. The request was denied. A codefendant of respondent's retained private counsel, but this attorney never consulted with respondent. Respondent was not tried together with this codefendant and was forced to proceed in propria persona.

The district court denied relief, but the Court of Appeals reversed. It found "a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed." (App. 47). The cause was remanded for reconsideration of sentence. The Court of Appeals found that placing the two invalid prior convictions before the jury (see *Burgett v. Texas*, 389 U.S. 109, 115 (1967)) was harmless error in view of the strong evidence of guilt and thus upheld the conviction itself (App. 47).

SUMMARY OF ARGUMENT

I. In robbing the Berkeley bank respondent committed a serious crime. A substantial prison term was plainly warranted. Yet a number of factors mitigated against imposing the statutory maximum of 25 years imprisonment. First, respondent used neither force nor violence. Secondly, although his carrying a gun subjected him to a maximum term of 25 years rather than 20 (compare subsections (a) and (d) of 18 U.S.C. 2113), he did not point it at any of the bank employees but merely "showed" it to them. Since the trial judge indicated that he did not at sentencing take into account charges of crime for which the defendant's guilt or innocence had not been determined, he must have based his decision to impose the maximum penalty at least in part on the three prior adjudications of respondent's guilt of felonies.

Yet two of these prior convictions were void for want of due process—for denial of the right to counsel, whose assistance this Court has held essential if one accused of a felony is to have any fair chance to establish his innocence.

Putting aside for the moment the question of prejudice, there was clearly technical error. The sentencing proceedings were conducted on the assumption that respondent had been *convicted* of two prior felonies when, constitutionally, he had not been. Had the sentencing hearing been conducted after *Gideon v. Wainwright*, the investigating

officer would have reported to the judge that respondent had been *arrested* in Florida in 1938 and in Louisiana in 1946 and that, because subsequent adjudications were constitutionally infirm, respondent's guilt or innocence on the charges had yet to be determined. The difference between an arrest and a conviction is surely of sufficient significance to compel the conclusion that, disregarding the issue of prejudice, respondent's sentencing proceeding was infected by error qua error.

Realizing this, the United States asks this Court to revalidate the defective prior convictions by holding that as to sentencing proceedings *Gideon v. Wainwright* will not be given retroactive application (App. 6, 14). But this Court has always applied its right-to-counsel due process decisions retroactively on the ground that, without counsel assisting the accused, the adjudication of his guilt is inherently unreliable. The presumption of innocence simply is not removed by uncounseled proceedings. The United States offers no reason or logic for refusing to give *Gideon* retroactive effect here (other than that the error was harmless, a separate point).

II. In the context of its mootness cases, this Court has already decided that there is a significant difference in the eye of a sentencing judge between an accusation of crime and a conviction. In *Sibron v. New York*, 392 U.S. 40, 56 (1968), the defendent had fully served his term of imprisonment, but this Court reviewed his conviction because of the "collateral consequence" that it might be used against him in future sentencing proceedings. *Sibron* necessarily upholds the Court of Appeals, decision in the present case that there was a "reasonable probability" that respondent's two defective prior convictions affected his sentence.

Moreover, under the common law of judgments a criminal conviction is res judicata—a conclusive adjudication of guilt. A convicted felon in respondent's position was, until *Gideon* made collateral attack possible, estopped to deny guilt of the crimes for which he stood convicted. Not only

that, but respectable authority held that imposition of a lengthy sentence estopped the convicted felon from denying the severity of the particular criminal acts purportedly supporting the conviction. Under this state of the law respondent's failure at the 1953 sentencing to assert innocence in respect to his 1938 and 1946 convictions—a factor stressed in brief by the United States—is in no way probative of guilt. It is irrelevant.

Wholly apart from the law of res judicata, the legal literature has repeatedly pointed out that unadjudicated charges of crime are not and must not be given the weight of prior convictions. There are many statements by judges themselves that they give more severe sentences to a defendant with one or more prior felony convictions. These authorities too support the Court of Appeals holding that respondent might have been given a less severe sentence had the 1938 and 1946 incidents been viewed as unadjudicated charges rather than convictions.

III. The four factors judges have traditionally weighed in imposing sentence are (1) punishment of the defendant for his wrong, (2) deterrence of others, (3) protection of society by segregating the defendant, and (4) rehabilitation of the defendant. When Judge Harris in 1953 imposed on respondent the maximum 25-year term of imprisonment, he could not realize that the more than 10½ years respondent had theretofore spent in prison, including 5½ years on a chain gang, was, as a matter of constitutional law, wrongful imprisonment. Had the judge had the benefit of *Gideon*, he might well have discounted the punishment factor in view of respondent's having already suffered over 10 years incarceration in violation of his constitutional rights. For the same reason the judge might have decided that respondent was not an appropriate defendant to sentence severely in order to deter others. With the judge's focus on rehabilitation of respondent and protection of society, it is reasonably probably that a more lenient sentence would have been imposed.

IV. The United State's fear (Brief, pp. 6-7 14) that affirmance of the Court of Appeals will require district court judges to reconsider a "vast number of sentences" (id at 14) rests on factually inaccurate premises and ignores pertinent statistics. The relief given respondent by the court below is proper only in the case of a defendant sentenced prior to the *Gideon* decision in March, 1963. At post-*Gideon* sentencing proceedings, defense counsel need only have pointed out the constitutional defect in any uncounseled prior convictions. They would then have been properly considered as unadjudicated charges of crime. Statistics disclose that more than 90% of convicted defendants sentenced eight or more years ago have already been released from prison. Moreover, the chances that a defendant sentenced before March, 1963 might have a prior conviction invalid under *Gideon* are slim, since as early as 1938 the great majority of jurisdictions appointed counsel for indigents charged with a felony. Finally, there has been since 1966 precedent for the relief given respondent (Bauers v. Yeager, 261 F.Supp. 420 (D.N.J. 1966)), but the reported decisions show not even a trickle, yet alone a flood, of similar petitions for resentencing.

Whether viewed from the standpoint of Fifth Amendment due process or the statutory mandate of 28 U.S.C. 2255 to correct serious errors in the sentencing process (even if not of constitutional dimension), it was proper to direct reconsideration of respondent's sentence in this case.

ARGUMENT

I

UNLESS *GIDEON V. WAINWRIGHT* IS REFUSED RETROACTIVE EFFECT IN THIS CASE, USE OF RESPONDENT'S INVALID CONVICTIONS AGAINST HIM AS CONVICTIONS (RATHER THAN ARRESTS) WAS AT LEAST TECHNICAL ERROR.

A conviction is much more than an arrest or accusation of criminal conduct. A conviction is conclusive of guilt; sentencing judges give a conviction far more weight than an unadjudicated accusation of criminal conduct.[5] For purposes of determining whether respondent has been denied due process (or whether his sentence was otherwise subject to attack under 28 U.S.C. 2255), the 1938 and 1946 convictions are concededly void. They have the status of mere arrests. Yet the transcript of respondent's sentencing hearing shows clearly that these incidents on respondent's record were treated as *convictions*, not as unadjudicated accusations. Putting aside the question of prejudice, this was certainly error if *Gideon v. Wainwright*, 372 U.S. 335 (1963), is applicable here.

To avoid this conclusion the United states contends that *Gideon* is not retroactive here (App. 6, 14, 16 n. 8). But this Court has always applied right-to-counsel decisions, such as *Gideon*, retroactively, "because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the *innocent*,'" *Johnson v. New Jersey*, 384 U.S. 719, 727-728 (1966) (emphasis added), and because "the judgment *lacked reliability*." *Linkletter v. Walker*, 381 U.S. 618, 639 n. 20 (1965) (emphasis added). See also *McConnell v. Rhay*, 393 U.S. 2, 3 (1968).

Right-to-counsel decisions have been given fully retroactive application not only to set aside uncounseled convic-

[5] See part II of the Argument herein.

tions themselves but to redress the collateral consequences of denial of counsel. In *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) an uncounseled guilty plea was placed before the jury. The resulting conviction was invalidated by giving retroactive effect to *White v. Maryland*, 373 U.S. 59 (1963). The judgment in *Burgett v. Texas*, 389 U.S. 109, 114-115 (1967), where uncounseled convictions were before the jury, was overturned by giving retroactive effect to *Gideon*.

Since, as the United States concedes (Brief, pp. 8, 11) information considered at sentencing must be substantially correct and reliable, see *Townsend v. Burke*, 334 U.S. 736, 741 (1948), and since this court has repeatedly held that uncounseled convictions are "unreliable" because the defendant may well have been innocent but unable to prove so without aid of counsel, the *Gideon* rule should be applied retroactively in this case.[6]

The United States also seems to contend (Brief pp. 8-10) that the broad discretion exercised by a sentencing judge precludes a finding of error in this case. Such discretion is, of course, the touchstone of modern penology and is in no way constitutionally objectionable itself. *McGautha v. California*, 402 U.S. 183, 207 (1971); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); *Williams v. New York*, 337 U.S. 241, 247 (1949). But that discretion has never entitled a sentencing judge to consider materially inaccurate and unreliable information. *E.g.*, *Townsend v. Burke*, supra, 334 U.S. 736, 741 (1948); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970); *United States v. Perchalla*, 407 F.2d 821, 823 (4th Cir. 1969); *Verdugo v. United States*, 402 F.

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[6]The fact stressed by the United States (Brief p. 16 n. 8), that respondent did not deny "the accuracy of the relevant convictions," goes to the question of prejudice, not the question of whether there was error. Respondent was not required to anticipate *Gideon*, as that decision itself makes clear. As noted in part II of this Argument, the very fact of conviction precluded a claim of innocence.

2d 599, 610-612 (9th Cir. 1968), cert. den. 397 U.S. 925 (1970).[7]

As aptly observed in *United States v. Lewis*, 392 F.2d 440, 442 (4th Cir. 1968), where mistake in the sentencing process may have resulted in substantial injustice, to direct reconsideration of the sentence "does not obtrude on the District Judge's discretion; to the contrary, it restores it." In the instant case, the sentencing judge's comment that he would not consider charges against respondent of bank robbery in Los Angeles suggests that the judge, in the exercise of *his* discretion, would weigh prior convictions but not unadjudicated accusations. Since *Gideon* had not then been decided, the judge had no opportunity in respondent's case to accurately apply this discretionary distinction as he was entitled to do. The judgment below gives him the opportunity to do so.

Respondent fully agrees with the United States that the doctrine of *Townsend v. Burke* embraces only serious and fundamental error in the sentencing process. But decisions such as *Arsenault v. Massachusetts, supra*, 393 U.S. 59 (1968), and *Burgett v. Texas, supra*, 389 U.S. 109 (1967) have firmly established that use against an accused of a prior plea or conviction obtained through denial of counsel is such a fundamental error. It does not necessarily follow from that conclusion, however, that all instances of collateral use of a prior conviction invalid under Gideon are prejudicial to the convicted person. Whether there was prejudice in respondent's case is the primary question now before the court.

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[7] [T]he specific sentence selected, may be beyond the ken of the appellate court. But the appellate court must scrutinize the sentencing process to insure that the trial judge has considered the information available with some regard for its reliability, and has evaluated the information in light of the factors relevant to sentencing." *Scott v. United States*, 419 F.2d 264, 266 (D. C. Cir. 1969).

II

UNDER THIS COURT'S MOOTNESS DECISIONS AND UNDER THE LAW OF RES JUDICATA, THE ERROR WAS PREJUDICIAL, SINCE A CONVICTION, UNLIKE AN ARREST, IS CONCLUSIVE OF GUILT. SENTENCING JUDGES HAVE ALWAYS GIVEN CONVICTIONS MORE WEIGHT THAN UNADJUDICATED CHARGES.

The 1938 and 1946 incidents on respondent's rap sheet were received against him as *convictions* (for larceny and burglary). With *Gideon* retroactive, we know now that they should have been viewed only as arrest—as accusations of crime for which respondent's guilt was unadjudicated. Is there, in the sentencing context, a substantial difference between prior arrests and prior convictions? If so the Court of Appeals properly found the error prejudicial.

In its decisions on the question of mootness, this Court appears already to have established that there is such a substantial difference. In *Sibron v. New York*, 392 U.S. 40, 55-56 (1968), the defendant had completed his jail term before the matter reached this Court for review. The case was held not moot, however, because of the collateral consequences of the conviction, one of which—emphasized in the *Sibron* opinion—was that the conviction would be before the courts in any future sentencing proceedings involving Sibron. 392 U.S. at 56. As explained in *Street v. New York*, 392 U.S. 576, 579-580 n. 3 (1969), *Sibron* holds that a criminal case is not moot where "the conviction could be used for impeachment and *sentencing* purposes in future criminal proceedings." (Emphasis added.)

In *Fiswick v. United States*, 329 U.S. 211 (1946), the case was held not moot because of the collateral consequence that the defendant's conviction might be used against him in deportation or naturalization proceedings, where "character" is an issue.[8] The Court said:

[8]Under modern sentencing philosophy that same "character" trait is one of the primary considerations of the judge. *Williams v. New York*, supra, 337 U. S. 241, 248 n. 10 (1949); *Pennsylvania v. Ashe*,

> "[T]he judgment, if undisturbed, stands as unimpeachable evidence that Fiswich committed the crime charged. . . .
>
> "An outstanding conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse." 329 U.S. at 221-222.

Even where a conviction is reversed, the underlying arrest and accusation of crime can be considered in future proceedings. (See Brief for United States, pp. 10-11, and authorities there cited.) This was true of the arrests of the defendants in both *Sibron* and *Fiswick*, yet this Court considered the collateral consequences of a conviction so much more serious than that of an unadjudicated charge or arrest that cases otherwise moot were decided on their merits and the judgments reversed.

What was said expressly in *Fiswick* (and implicitly in *Sibron*) is a correct statement of the prevailing American law on the collateral estoppel effect of a conviction—including convictions from another jurisdiction. In several states, such as Pennsylvania, the life or death sentence of a defendant convicted of first-degree murder is determined by a jury, which is given "'the same sort of information that a judge considers when deciding as to punishment for crime.'" *Commonwealth v. Thompson*, 389 Pa. 382, 133 A. 2d 207, 215 (1957), cert. den 355 U.S. 849 (1957). This includes prior convictions, which the jury considers for the bearing they have on the defendant's character.[9] The Pennsylvania Supreme Court has declared such prior convictions to be conclusive determinations of guilt of the underlying offense. *Commonwealth v. Thompson, supra*, 133 A.2d at

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302 U. S. 51, 55 (1937). The logic of *Fiswick* is thus as applicable to sentencing as it is to naturalization and deportation proceedings.

[9]Significantly, the jury as sentencing authority may not be advised of the defendant's prior arrests. *Commonwealth v. Thompson, supra*, 133 A.2d at 217 (1957).

218 (prior U. S. military court martial conviction); *Commonwealth v. Simmons*, 361 Pa. 391, 65 A.2d 353, 359 (1949), cert. den. 338 U.S. 862 (1949).

Under typical recidivist sentencing statutes, which make an increased sentence mandatory in the event the defendant has prior felony convictions, the defendant is estopped by the conviction to assert innocence of the prior crime. *E.g., People v. Rice*, 169 Misc. 591, 8 N.Y.S. 2d 87 (Kings County Ct. 1938); *People v. Dacey*, 166 Misc. 827, 3 N.Y. S. 2d 156, 161 (Gen. Sess. N.Y. County 1938); former 26. U.S.C. 7237(c) (2), 68A Stat. 860, as amended (sole issue is whether defendant is same person who suffered prior conviction) (repealed effective May 1971, 84 Stat. 1236); cf. American Law Institute, Model Penal Code §§ 7.03–7.05 (1962).[10]

The collateral estoppel effect of a prior conviction is also found in the analogous cases where priors are used to impeach a witness by showing a character defect. (Analogous, since the sentencing the prior convictions are received for their bearing on character. See footnote 8, *supra*.) The majority rule is that the prior conviction is conclusive of the witness' guilt and may not be rebutted by any attempted proof of innocence. See 4 Wigmore, Evidence § 1116 (3d ed. 1940); *Lee v. State*, 69 So. 2d 467, 468-469 (Ala. App. 1953) (conviction "conclusive" of guilt); *State v. Keillor*, 50 N.D. 728, 197 N.W. 859, 861 (1924) (conviction "conclusive" of guilt). As held in *Donnelly v. Donnelly*, 156 Md. 81, 143 A. 648, 650 (1928): "The party may not give evidence that he was not guilty of the crime, since the conviction is conclusive evidence of his guilt . . . ."[11]

[10]While, technically, it is the fact of conviction that triggers the increased sentence under such recidivist statutes, the obvious legislative policy and purpose is to increase punishment because of the character defect of propensity for crime, a defect inferred from prior commission of a felony, of which the defendant's guilt is conclusively presumed from his prior conviction.

[11]The rule that the conviction is "conclusive" of guilt is drawn from the law of collateral estoppel and res judicata, not the principle of

There is also respectable authority that the particular sentence imposed on a previously convicted defendant is conclusive on the severity or wrongfulness of the actual conduct purportedly underlying the conviction. That is, if the defendant was given the maximum sentence, his conduct must have been highly culpable. As this Court recognized in *Fiswick v. United States, supra,* 329 U.S. 211, 222 (1946), this doctrine bars any showing of ameliorating circumstances. The leading case is *Lamoureux v. New York, N.H. & H.R. Co.*, 169 Mass 338, 340, 47 N.E. 1009 (1897), where Justice Holmes held:

> "[T]he conviction, must be left unexplained. Obviously the guilt of the witness cannot be retired. [Citations.] It is no less impossible to go behind the sentence to determine the degree of guilt."[12]

The United States repeatedly emphasizes the fact that at the 1953 proceedings respondent did not "suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated." (Brief for United States, p. 15). That is true. Given his right of allocution, respondent indicated he felt that his guilt or innocence of the priors was "neither here nor there" (App. 35).

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the law of evidence permitting the court to restrict proof offered on matters collateral to the substantive issues being litigated. The same is true of the holding in *Lamourex v. New York, N. H. & H. R. Co.*, 169 Mass. 338, 47 N.E. 1009 (1897), quoted in text, *infra.*

As Wigmore indicates a few cases have declined to hold a prior conviction conclusive of guilt. The Court, if course, need not resolve the dispute in this case. The issue here is harmless error, and certainly it is reasonably probable that both the judge who sentenced respondent in 1953 and respondent's attorney at that proceeding believed, in light of the majority rule, that respondent's 1938 and 1946 prior convictions were conclusive of his guilt of grand larceny and breaking and entering in Florida and burglary in Louisiana.

[12]The rule stated is followed in a minority of jurisdictions. For example, *Donnelly v. Donnelly, supra,* is contra. But, again, the issue is not what the better rule of collateral estoppel is but whether the error in respondent's 1953 sentencing proceeding was prejudicial. See footnote 11, *supra.*

Surely, however, it is reasonably probable that respondent, assisted by counsel at the hearing, did not seek to ameliorate the seriously damaging impact of his prior convictions because he had been advised that those convictions were conclusive of guilt. Is it not also reasonably probable that, regardless of his guilt or innocence of the priors that were before the court, respondent did not speak about them because he had been made aware of the fact that most judges consider a man who persists in protesting his innocence after having been duly convicted to be a poor candidate for prompt rehabilitation and thus deserving of a stiffer sentence?[13] See *Scott v. United States, supra,* 419 F.2d 264 (D.C. Cir. 1969), particularly the concurring opinion of Judge Leventhal at 282.

Wholly apart from the law of res judicata and collateral estoppel, the error at respondent's sentencing hearing was prejudicial because of the likelihood that Judge Harris, like most sentencing judges, followed the practice of weighing prior *convictions* heavily against the defendent while discounting (or even disregarding) unadjudicated charges of crime.

In *United States v. Doyle,* 348 F.2d 715, 721 (2d Cir. 1965), cert. den. 382 U.S. 843 (1965), the court states that a sentencing judge is not barred from considering unproved criminal charges but adds: "Of necessity, much of the information garnered by the probation officer will be hearsay and will doubtless be discounted accordingly. . . ." The widely respected Guides For Sentencing (1957) by the Advisory Council of Judges of the National Probation and

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[13] In an analogous context, it is believed that an accused, attempting to help himself by being cooperative with the police, will admit guilt of prior unsolved crimes which, in fact, he did not commit. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 201 (1969).

Parole Association,[14] noting that judges generally deny probation to a defendant with a prior felony conviction (pp. 41, 49) states:

> "Several cautions should be exercised in evaluating the defendant's previous record . . . . A history of arrests should be distinguished from prior convictions." (P. 41)

American Bar Association Advisory Committee on Sentencing and Review, Standards Relating to Probation (approved Draft 1970), states that a presentence investigation should be made of the defendant's prior criminal record (p. 34), with the following caveat:

> "A word should also be added in explanation of what is meant by 'prior criminal record'. . . . By this the Advisory Committee means to include only those charges which have resulted in a conviction. Arrests, juvenile dispositions short of an adjudication, and the like can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions. If such items should be included at all—and the Advisory Committee would not provide for their inclusion—at the very least a detailed effort should be undertaken to assure that the reader of the report cannot possible mistake an arrest for a conviction." (P. 37)

The prejudice to the defendant which the A.B.A. Committee fears rests on the fact that a properly informed sentencing judge does not weigh a mere arrest against a defendant nearly as much as he does a prior conviction. Indeed "evidence of mere arrests has usually been regarded as incompetent and inadmissible" at a sentencing hearing. Annotation, Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defend-

[14] This book has been endorsed by several federal judges. *E.g.*, Murrah, The Dangerous Offender Under the Model Sentencing Act, 45 F.R.D. 161, 162-163 (1967); Thomsen, Sentencing the Dangerous Offender, 45 F.R.D. 175, 175n. 1 (1967).

ant, 96 A.L.R. 2d 768, 773 (1964), See Comment, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L. J. 1453, 1467 n. 73 (1960).

The prejudice to a defendant resulting from a prior felony conviction on his record is particularly acute when he is eligible for probation. With respect to many offenses, the general sentencing practice is to grant probation to one without prior felony convictions and to deny probation to a defendant with such a conviction. See, *e.g.*, Dawkins, Probation or Prison? Youth or Adult [at Fifth Circuit Sentencing Institute], 30 F.R.D. 276, 276, 278 (1961); Youngdahl, Sentencing the Automobile Thief to Probation or Prison—as Youth or Adult [at Pilot Institute on Sentencing] 26 F.R.D. 300, 302 (1959); Advisory Council of Judges of the National Probation and Parole Association, *supra*, Guides For Sentencing 49 (1957). As the sentencing judge explained in *Ohio v. Emonds*, 29 J. Crim. L. C. & P. S. 427, 434 (Common Pleas, Cuyohoga County, Ohio 1938):

> "Generally a record of previous misconduct raises a presumption that the offensive conduct will be repeated in the future and therefore makes probation unjustifiable."[15]

Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence (1969), presents studies showing that except on conviction of the most serious crimes, a defendant with no prior convictions is almost always given probation (pp. 39, 81).

> "Attention is directed primarily at prior felony convictions. A defendant who has several misdemeanor convictions on his record or several arrests not followed by conviction is regarded as a first offender for these purposes." (pp. 81-82.)

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[15]Even where probation is inappropriate the first offender is usually treated with greater leniency than one with prior convictions. See, *e.g.*, Miller, Violations not Related to Other Crimes [at Fifth Circuit Sentencing Institute] 30 F.R.D. 310, 314 (1961); Annotation, 96 A.L.R. 2d 768, 772 (1964).

Respondent does not contend, in view of the seriousness of the crime he committed in Berkeley in 1951 and in view of his presumptively valid 1950 conviction, that absent the error he would have received probation. Respondent, even with the benefit of *Gideon*, was almost certainly going to get a substantial sentence. But that could have been 15 years rather than 25. The attitudes of sentencing judges in the probation context disclose the strong impact that prior convictions have on the courts. This same attitude appears to result in imposition of a more severe sentence on a defendant with several prior convictions (such a three in respondent's case as it appeared to Judge Harris) than with only one. See *United States ex rel Thompson v. Rundle*, 924 F.Supp. 933, 935 (E.D. Pa. 1968); cf. *Sibron v. New York, supra*, 392 U.S. 40, 56 (1968).

The United States argues at length that a sentencing judge cannot properly exercise his discretion, cannot impose a sentence that fits the criminal and his character as well as the crime, if the judge cannot examine all of the defendant's prior criminal record (Brief for United States, pp. 11-12, 14). Respondent agrees. But the United States also concedes that the evidence considered must be reliable, that is, fairly accurate (*id* at 8, 11). Reliability is particularly important in so far as the evidence may indicate that the defendant has previously committed felonies, since, "[t]oday's philosophy of individualizing sentences makes sharp distinctions for example between the first and repeated offenders." *Williams v. New York, supra*, 337 U.S. 241, 247 (1949).

The United States is in error in suggesting (Brief, pp. 11-12) that the holding below bars a sentencing judge from considering unadjudicated charges of crime. In fact, the Court of Appeals merely directed "resentencing without consideration of any *prior convictions* which are invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963)" (App. 48, emphasis added.) In other words the 1938 and 1946 incidents on respondent's record must be considered in the

proper context—as hearsay charges in no way conclusive of guilt.[16]

There is nothing in the record of respondent's 1953 sentencing hearing to suggest that the judge considered respondent's invalid prior convictions as mere unadjudicated charges. Since *Gideon* had not been decided then, there was no reason for him to do so. Reviewing that proceeding now under *Gideon's* mandate, it seems clear that respondent "was prejudiced for he was sentenced on the basis of assumptions about his criminal record which were materially untrue." *United States v. Malcolm, supra,* 432 F.2d 809, 816 (2d Cir. 1970).

III

HAD THE SENTENCING JUDGE REALIZED THAT RESPONDENT'S PREVIOUS 10-YEARS IMPRISONMENT WAS CONSTITUTIONALLY WRONGFUL IMPRISONMENT, HE MIGHT HAVE DEALT MORE LENIENTLY WITH RESPONDENT.

As the United States points out, judges consider numerous factors in assessing the appropriate sentence for a defendant. These include, of course, the defendant's potential for rehabilitation and the need to protect society from further crimes by the defendant through his segregation from society by incarceration. Additional considerations

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[16] The Court of Appeals for the Third Circuit set forth the appropriate procedure in the analogous situation where uncounseled juvenile court "convictions" are before the sentencing judge:

> "In particular, a juvenile record may, as in this case, convey instructive evidence of the defendant's probable response to remedial efforts. So long as a judge considers such a record in its proper perspective—i.e., as a reference to non-criminal proceedings where no counsel was required and where the purpose was not penal but curative—there can be no ground for complaint. Thus the absence of counsel at juvenile proceedings is a factor which limits the use of the juvenile record, but does not forbid it." *United States v. Myers,* 374 F.2d 707, 708 (3d Cir. 1967).

which militate in favor of a lengthy sentence are (1) deterring others from similar crime does not pay (the deterrent factor) and (2) punishing the defendant for his wrong (the retributive factor). See S. Rubin, The Law of Criminal Correction 646 (1963).

It seems reasonably probable that Judge Harris, decision to impose on respondent the maximum 25-year sentence was based in part on the deterrent and retributive factors. But, since *Gideon* had not then been decided, the judge in making his decision was necessarily unaware that the more than 10½ years respondent had previously spent imprisoned, including 5½ years on a chain gang, was constitutionally wrongful imprisonment. In sum, respondent had already suffered extensive and severe punishment in violation of his constitutional rights enunciated in *Gideon*. If this could have been brought out, the judge surely would have discounted the retributive factor of sentencing in respondent's case. Likewise he might well have concluded that respondent was not the appropriate defendant to sentence harshly for the purpose of deterring others. Unquestionably respondent's prior imprisonment on unreliable, uncounseled convictions afforded reasonable grounds for some mercy (for example, a 15- or 20-year sentence rather than the maximum). The order of the Court of Appeals now gives Judge Harris the opportunity to exercise his discretion in the light of such considerations.

Admittedly the opinion of the Court of Appeals here does not expressly invoke this theory; however, it is well-supported by precedent and is an alternative basis for affirming the decision below.

In *Bauers v. Yeager, supra,* 261 F.Supp. 420 (D.N.J. 1966), the habeas corpus petitioner was serving a term in prison on three state-court convictions in 1961 for armed robbery. In 1964 the state court expunged a 1953 conviction—on which petitioner had served 16 months in prison—for failure to have treated petitioner as a juvenile offender in the 1953 proceedings. The Federal district

court held petitioner not entitled to have the 16 months wrongfully served by him "credited" against his 1961 sentence for the robberies. However, the court held:

> "[O]ur conclusion does not mean that petitioner is to be denied relief by this court. In the usual case where a defendant has served time under a sentence which had been judicially declared illegal and is subsequently brought before a court for sentencing on another matter, he has the opportunity of bringing that fact to the attention of the sentencing court. In the instant case, however, because of the timing of the suit brought to have the sentence expunged, petitioner could not present the pertinent fact to the court at the time of his sentencing in 1961. Illegally depriving a man of his liberty for a period of time is a serious matter, and we feel that due process requires that petitioner be given the opportunity of presenting this fact for consideration to the sentencing court." 261 F.Supp. at 424-425.

Precisely the same holding, under similar circumstances, was made in *United States v. Rundle*, 279 F.Supp. 153 (E.D.Pa. 1968).

In the instant case the district courts should at least have the opportunity to consider the reasoning of these precedents and to weigh respondent's prior wrongful imprisonment against the factors which, in its discretion, previously led it to impose the maximum sentence. The judgment below properly gives Judge Harris such an opportunity.

IV

THE DECISION BELOW WILL NOT OPEN A FLOODGATE TO COLLATERIAL ATTACKS SINCE, STATISTICS SHOW, VERY FEW DEFENDANTS SENTENCED PRE-*GIDEON* ARE STILL INCARCERATED. FEW OF THOSE WHO ARE HAVE PRIORS UNDER *GIDEON*.

The United States' parade of horrors argument foresees the decision below as requiring "the reopening of a vast number of sentences" (Brief, p. 14). This speculation is refuted by the available facts.

Firstly, there is nothing novel about respondent's petition for relief. It has been settled since 1948 that due process is violated and resentencing appropriate where a "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Townsend v. Burke, supra,* 334 U.S. 736, 741 (1948). The reported decisions show no flood of petitions based on this doctrine. It has also been clear since *Linkletter v. Walker, supra,* 381 U.S. 618, 639 n. 20, decided in 1965, that an uncounseled felony conviction is unreliable as an indication of guilt. Viewed as proof of guilt it is materially untrue under the *Townsend* test. Secondly, as noted in part III of the Argument herein, there has been since 1966 square precedent that reconsideration of sentence is required where what appeared at sentencing to be a valid prior conviction is subsequently set aside.

Thus, the flood of petitions feared by the United States should have appeared several years ago. None has, so far as the reported cases show. In fact, the various lower courts appear to have had no difficulty in handling attacks on sentences based on the *Townsend* principle and in formulating the appropriate relief. See, *e.g., United States v. Malcolm, supra,* 432 F.2d 809 (2d Cir. 1970); *Scott v. United States,* 419 F.2d 264, 266 (D.C. Cir. 1969); *Putt v. United States,* 363 F.2d 369 (5th Cir. 1966), cert. den. 385 U.S. 962 (1966) (sentencing judge found untrue data did not influ-

ence his decision); *State v. Pohlabel*, 61 N.J. Super. 242, 160 A.2d 647 (1960); *Ex Parte Hoopsick*, 172 Pa. Super. 12, 91 A.2d 241 (1952). Cf. *United States v. Eberhardt*, 417 F.2d 1009, 1014-1015 (4th Cir. 1969), cert. den. 397 U.S. 909 (1970) The lower courts have not infrequently granted reconsideration of sentence, and, obviously, they have not found insurmountable difficulties in the fears expressed by the United States in the instant case that the sentencing judge may not recall the reasons for his sentence imposed several years before[17] or may be dead or retired. Certainly the record in the instant case in no way suggests that the lower courts are suffering such administrative problems in applying the *Townsend* principle. It would seem to be unnecessary for this Court to act as supervisor over the procedures being developed in the lower courts until problems do arise or inconsistent treatment in the circuits emerges.

In any event, to the extent that affirmance of the Ninth Circuit here may be viewed as opening a floodgate, statistics show that there are very few prisoners eligible for relief. The flow purportedly being held back just is not there.

Prisoners sentenced *after* March 1963 when *Gideon* was decided,—over eight years ago—have no complaint under the ruling of the Court of Appeals in this case. *Gideon* permitted collateral attack on the defective prior convictions; all the post-*Gideon* defendant or his counsel[18] had to do was bring out the fact of denial of counsel and the sentencing judge would have properly viewed the "prior" as merely

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[17]Of course a judge will know how, as a general practice, he viewed prior convictions at sentencing proceedings. If it was his practice to usually give a stricter sentence to one with prior felony convictions, he will know that the inadvertent error in considering an invalid prior almost certainly resulted in a longer sentence and that some reduction may be appropriate.

[18]If the defendant was without assistance of counsel at sentencing he obtains relief on that ground. *McConnell v. Rhay*, *supra*, 393 U. S. 2 (1968).

an unadjudicated charge. A post-*Gideon* sentencing attorney's failure to attack the validity of the prior would be a tactical decision (such as to depict the defendant as completely repentent and cooperative) and would not warrant relief.

Among federal prisoners only 12 to 14 percent have received sentences of five years or more. Appellate Review of Sentences, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 2722, 89th Cong. 2d Sess. p. 12 (March 1966). The average prisoner serves only 61 percent of his sentence. *Id.* at 52. More than 91 percent of federal prisoners are released from prison within five years. Among state prisoners an even greater percentage are released within five years (99 percent in some states, such as Wisconsin). Advisory Council of Judges of the National Council on Crime and Delinquency, Model Sentencing Act 24-25 (1963).

There are thus few pre-*Gideon* prisoners.[19] Of those who are, fewer still are likely to have priors defective under *Gideon.* As early as 1938 a majority of American jurisdictions appointed counsel in all felony cases. Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chic. L. Rev. 1, 16-17 (1962). And in most of the states which, pre-*Gideon,* did not as a matter of law require appointment of counsel, the general practice was to provide for counsel in felony cases. *Id.* at 17-20, 67-74.

Moreover, among the prisoners who were sentenced in part on *Gideon*-defective prior convictions, those who received less than the maximum sentences and who have since had disciplinary incidents at prison would probably decline to seek re-sentencing, since under *North Carolina v. Pearce, supra,* 395 U.S. 711, 726 (1969) the likely result of re-sentencing would be an increased term of imprisonment.

[19] Respondent has asked the Bureau of Prisons if it can furnish accurate current figures on this point.

The instant case does not require this Court to consider whether the *Townsend* principle is offended by use at sentencing of prior convictions retroactively invalidated for reasons other than denial of counsel. In any event, it does not necessarily follow, as the United States suggests, that resentencing is required when a prior conviction is, subsequent to its being considered at sentencing, set aside for error such as abridgement of the right of cross examination or the privilege against self-incrimination. (Compare Brief for United States, p. 14 and cases there cited.) These are serious errors, to be sure; but there are degrees of reliability of guilt determinations. Manifestly, where counsel has been denied, the conviction is wholly unreliable as proof of guilt. The *Townsend* principle admits of drawing a line at this point.

Finally, the decision below of the Court of Appeals may be affirmed as a proper exercise of its statutory power to direct reconsideration of a sentence pursuant to 28 U.S.C. 2255, without regard to whether the error in respondent's sentencing proceeding was of constitutional dimension. As the Fourth Circuit observed in *United States v. Lewis*, 392 F.2d 440, 443 (4th Cir. 1968), section 2255 specifically provides for collateral attack "otherwise" than for constitutional error. In *Lewis*, the sentencing judge's "misapprehension of law" (p. 444) was found to be such prejudicial but nonconstitutional error as to require reconsideration of sentence. Under the *Lewis* interpretation of section 2255, the unfairness in respondent's sentencing proceedings makes reconsideration appropriate, and it becomes unnecessary to decide if due process was violated. Almost certainly Judge Harris sentenced respondent under a "misapprehension" in that he viewed respondent's 1938 and 1946 convictions as conclusive of guilt. "[T]he price of correcting the injustice is insubstantial; the [respondent] can readily be resentenced." *United States v. Myers, supra*, 374 F.2d 707, 711-712 (3d Cir. 1967); See also *United States v. Lewis, supra*, 392 F.2d 440, 443 (courts will more freely order re-sentencing than they will overturn a conviction).

CONCLUSION

For the foregoing reasons the decision below should be affirmed. In the alternative, if it is felt that the lower courts should have additional opportunity to work out procedures for implementing the principle of *Townsend v. Burke*, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

William A. Norris

William A. Reppy, Jr.

Attorneys for Respondent

EXHIBIT A TO RESPONDENT'S BRIEF

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
BEFORE THE HONORABLE LIONEL J. WILSON, JUDGE
DEPARTMENT NO. 7

IN THE MATTER OF THE APPLICATION OF FORREST S. TUCKER, Petitioner,

v.

FRANK MADIGAN, Sheriff of Alameda County and

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents,

v.

FORREST S. TUCKER, Defendant.

No. 25174

PETITION FOR WRIT OF HABEAS CORPUS OR OTHER ALTERNATIVE WRIT

COURTHOUSE, OAKLAND, ALAMEDA COUNTY, CALIFORNIA

July 14, 1971

APPEARANCES

FOR THE RESPONDENTS: RAE BOKER, Deputy District Attorney

FOR THE PETITIONER: FORREST S. TUCKER, Appearing in Propria Persona, and assisted by:

JAMES HOOLEY, Public Defender

THE COURT: In the Matter of the Application of Forrest S. Tucker, for Writ of Habeas Corpus.

MR. HOOLEY: Yes, Your Honor, we would submit the matter.

MR. BOKER: Submitted, Your Honor.

THE COURT: This matter is on for decision this date.

This case has a history which is unique in the experience of this court in ten years on the bench. Some eighteen years ago the defendant, Forrest Tucker, was brought to trial and convicted in the United States District Court on May 23, 1953, of bank robbery and was sentenced to twenty [sic.] years in prison. In November of the same year defendant was tried and convicted in two successive trials in the Alameda County Superior Court of numerous counts of armed robbery, and on those convictions and on the basis of two prior felony convictions in Florida and Louisiana, Mr. Tucker was declared an habitual criminal and sentenced to State Prison as such.

Various proceedings were had thereafter in the State and Federal courts, and finally in 1966 the California Supreme Court ordered the Alameda County Superior Court to redetermine its prior determination of habitual criminality. After an evidentiary hearing, the Alameda County Superior Court found the two prior felony convictions were invalid in that the defendant was without counsel in each of said causes and had not intelligently waived his right to counsel and the two priors were ordered stricken.

Thereafter on January 28, 1971, the United States Court of Appeals reversed the order of the United States District Court, denying Mr. Tucker's Petition for Writ of Habeas Corpus and remanding the cause to the United States District Court for further hearing.

One of the Petitioner's contentions in the aforesaid writ challenged the adequacy of representation by Counsel in the trial in which the robbery convictions were rendered in the cause now before this Court, and it is interesting to note

the Circuit Court Specifically did not deal with this contention, Stating: "Our disposition of the case makes it unnecessary to consider appellant's second contention." Subsequently, in an Order dated March 16, 1971, Judge Oliver J. Carter of the United States District Court, remanded the case to the Alameda County Superior Court with the order that this Court set aside the verdict and sentence heretofore rendered in this Court and either grant petitioner a new trial on those charges or dismiss the indictment.

The matter having been assigned to Department 7 of the Alameda County Superior Court for proceedings in keeping with the order of the United States District Court, and evidence having been received by this Court as well as the issues of law involved, those legal issues having been discussed more extensively in memoranda submitted to this Court by each of the respective parties, this Court finds as follows:

The defendant, Forrest S. Tucker, having been in the continuous custody of the Federal Prison System and California State Prison System for approximately eighteen years.

During the period immediately preceding and at the time of defendant's trial and conviction in this County in Action No. 25174, the instant Action defendant was held practically incommunicado and extensive, unwarranted restraints were placed upon defendant's Counsel, the Public Defender of Alameda County, which unduly and unfairly restricted defendant's Counsel from adequately preparing his defense, which was based upon the theory of "alibi". In the face of vigorous objections to such motions by the prosecuting attorney, request by defense counsel for a continuance in order to prepare properly defendant's defense was denied and defendant was ordered to stand trial under circumstances which raise serious questions with respect to denial of the right to counsel and due process of constitutional dimensions.

Defendant, having been denied the right to properly prepare and present his alibi defense eighteen years ago and having been in continual custody over this same period of time, it is extremely unlikely defendant could at this

time prepare such a defense, and defendant has presented convincing evidence to this effect.

Defendant is in custody of the Federal Prison system and has been placed on lifetime parole by the California Adult Authority.

In view of all the aforesaid circumstances—and I might say the Court has also considered the impression made by the defendant on this Court during the numerous hearings in which he has been before the Court and has been impressed with the manner in which the defendant has conducted himself and the attitude he has reflected of patience and cooperation, and anyone who can be patient after eighteen years is a very patient person—the Court has also taken those factors into consideration, and in view of the aforesaid facts and circumstances, it is this Court's opinion that the considerations of justice, fairness and equity demand a dismissal and this Court does dismiss the charges contained in Indictment No. 25174 in the interests of justice and pursuant to the applicable statutory provisions, and it is so ordered.

MR. HOOLEY: Thank you, Your Honor. May the defendant be released from the order which brought him from McNeil?

THE COURT: It is so ordered.

MR. HOOLEY: Thank you.

THE COURT: Good luck to you.

MR. TUCKER: Thank you, Your Honor.

UNITED STATES v. TUCKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–86. Argued November 11, 1971—Decided January 11, 1972

In imposing sentence upon a defendant convicted of bank robbery, a federal district judge gave explicit consideration to the defendant's record of previous convictions. It was later conclusively determined that two of the previous convictions were constitutionally invalid, having been obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335. *Held:* Under these circumstances the Court of Appeals was correct in remanding the case to the District Court for reconsideration of the sentence imposed upon the defendant. Pp. 446–449.

431 F. 2d 1292, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 449. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Allan A. Tuttle argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Richard B. Stone, Beatrice Rosenberg,* and *Mervyn Hamburg.*

William A. Reppy, Jr., by appointment of the Court, *post*, p. 935, argued the cause for respondent. With him on the brief was *William A. Norris*, by appointment of the Court, 403 U. S. 930.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1953 the respondent, Forrest S. Tucker, was brought to trial in a federal district court in California upon a charge of armed bank robbery. He pleaded not guilty. Four female employees of the bank were called as wit-

nesses for the prosecution, and they identified the respondent as the robber. He testified in his own behalf, denying participation in the robbery and offering an alibi defense. To impeach the credibility of his testimony, the prosecution was permitted on cross-examination to ask him whether he had previously been convicted of any felonies. He acknowledged three previous felony convictions, one in Florida in 1938, another in Louisiana in 1946, and a third in Florida in 1950. At the conclusion of the trial the jury returned a verdict of guilty. In the ensuing sentencing proceeding the District Judge conducted an inquiry into the respondent's background, and, the record shows, gave explicit attention to the three previous felony convictions the respondent had acknowledged.[1] The judge then sentenced him to serve 25 years in prison—the maximum term authorized by the applicable federal statute, 18 U. S. C. § 2113 (d).

Several years later it was conclusively determined that the respondent's 1938 conviction in Florida and his 1946

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[1] An FBI agent was present at the sentencing proceeding. The District Judge began the proceeding by stating, "I would like to have the Agent's testimony with respect to the prior convictions."

The agent testified, in relevant part, as follows: "As the defendant said, when he was a juvenile, I believe it was in 1938, he received a ten-year sentence in Florida. . . .

". . . He said there was five years and four months on the chain gang. . . . and he said he actually served two years beyond that. . . .

"In 1950 Mr. Tucker was sentenced to a five year term in the State of Florida, for, I believe it was burglary, and on January the 5, 1951, while in custody in the hospital, he escaped.

"In 1946 he was convicted in the State of Louisiana on a felony charge and given a term of 4 years.

". . . I believe it was a burglary."

conviction in Louisiana were constitutionally invalid. This determination was made by the Superior Court of Alameda County, California, upon that court's finding in a collateral proceeding that those convictions had resulted from proceedings in which the respondent had been unrepresented by counsel, and that he had been "neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." [2]

Thereafter the respondent initiated the present litigation. Proceeding under 28 U. S. C. § 2255, he filed a motion in the Federal District Court in which he had been convicted in 1953, claiming that introduction at the 1953 trial of evidence of his prior invalid convictions had fatally tainted the jury's verdict of guilt. Upon consideration of the motion, the District Judge agreed that "the use of the constitutionally invalid prior convictions on cross-examination for impeachment purposes was error," but found that the error was harmless beyond a reasonable doubt, in view of the overwhelming trial evidence that the respondent had been guilty of the bank robbery. *Tucker* v. *United States,* 299 F. Supp. 1376. See *Chapman* v. *California,* 386 U. S. 18; *Harrington* v. *California,* 395 U. S. 250.

On appeal, the Court of Appeals for the Ninth Circuit agreed that it had been "firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt." It went on, however, to find that there was "a reasonable probability that the defective prior convictions may have

[2] The decision of the Superior Court of Alameda County is unreported, but the accuracy of that court's determination is not questioned. See *In re Tucker,* 64 Cal. 2d 15, 409 P. 2d 921; *Tucker* v. *Craven,* 421 F. 2d 139.

led the trial court to impose a heavier prison sentence than it otherwise would have imposed." Accordingly, the appellate court affirmed the refusal to vacate the conviction, but remanded the case to the District Court for resentencing "without consideration of any prior convictions which are invalid under Gideon v. Wainwright, 372 U. S. 335." 431 F. 2d 1292, 1293, 1294. The Government came here with a petition for a writ of certiorari, which we granted. 402 U. S. 942.

The Government asks us to reverse the judgment of the Court of Appeals insofar as it remanded this case to the District Court for resentencing. It argues that a federal district judge has wide and largely unreviewable discretion in imposing sentence, and that in exercising that discretion his relevant inquiry is not whether the defendant has been formally convicted of past crimes, but whether and to what extent the defendant has in fact engaged in criminal or antisocial conduct. Further, the Government argues, in view of other detrimental information about the respondent possessed at the time of sentencing by the trial judge, it is highly unlikely that a different sentence would have been imposed even if the judge had known that two of the respondent's previous convictions were constitutionally invalid. Accordingly, the Government concludes that to now remand this case for resentencing would impose an "artificial" and "unrealistic" burden upon the District Court.

It is surely true, as the Government asserts, that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. *United States* v. *Trigg*, 392 F. 2d 860, 864; *Davis* v. *United States*, 376 F. 2d 535, 538; *Cross* v. *United*

States, 354 F. 2d 512, 514; *United States* v. *Doyle*, 348 F. 2d 715, 721; *United States* v. *Magliano*, 336 F. 2d 817, 822; Fed. Rule Crim. Proc. 32 (a)(2). See *Williams* v. *New York*, 337 U. S. 241; *North Carolina* v. *Pearce*, 395 U. S. 711, 723. The Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review. *Gore* v. *United States*, 357 U. S. 386, 393. Cf. *Yates* v. *United States*, 356 U. S. 363.

But these general propositions do not decide the case before us. For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in *Townsend* v. *Burke*, 334 U. S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.*, at 741. The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him.[3] Yet it is now clear that two of those convictions were wholly unconstitutional under *Gideon* v. *Wainwright*, 372 U. S. 335.[4]

We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer.[5] Such speculation is not only fruitless, but

[3] See n. 1, *supra*.

[4] The respondent's convictions occurred years before the *Gideon* case was decided, but the impact of that decision was fully retroactive. *Pickelsimer* v. *Wainwright*, 375 U. S. 2.

[5] It is worth pointing out, however, that to make the contrary assumption, *i. e.*, that the prosecutions would have turned out exactly the same even if the respondent had had the assistance of counsel, would be to reject the reasoning upon which the *Gideon* decision was based:

"[R]eason and reflection require us to recognize that in our

quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.[6]

We agree with the Court of Appeals that the answer to this question must be "yes." For if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.[7] We cannot agree with the Government that a re-evaluation of the re-

adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." 372 U. S., at 344.

[6] The constitutional validity of the respondent's third conviction—in Florida in 1950—has not been determined. The Government states in its brief that it has been informed by the clerk of the Criminal Court of Records of Dade County, Florida, that the respondent had counsel at that trial. The respondent's brief states that the respondent has advised his present counsel that at the 1950 Florida proceeding he specifically asked the judge to appoint counsel for him because of his indigence and that the request was denied.

[7] See n. 1, *supra*.

spondent's sentence by the District Court even at this late date will be either "artificial" or "unrealistic." [8]

The *Gideon* case established an unequivocal rule "making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett* v. *Texas*, 389 U. S. 109, 114. In *Burgett* we said that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.*, at 115. Erosion of the *Gideon* principle can be prevented here only by affirming the judgment of the Court of Appeals remanding this case to the trial court for reconsideration of the respondent's sentence.

The judgment is affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion, of course, is a fine and acceptable exposition of abstract law. If I felt that it fit Tucker's

[8] As noted above, at 445, and emphasized in the dissenting opinion, the trial judge, in ruling upon the respondent's present § 2255 motion, held that the wrongful use of the invalid previous convictions to impeach the respondent's testimony at the 1953 trial was harmless error, in view of the overwhelming evidence that he was guilty of the bank robbery. But the respondent's guilt of that offense hardly "translates" into an "inescapable" assumption that the trial judge would have imposed a maximum 25-year prison sentence if he had known that the respondent had already been unconstitutionally imprisoned for more than 10 years. It would be equally callous to assume, now that the constitutional invalidity of the respondent's previous convictions is clear, that the trial judge will upon reconsideration "undoubtedly" impose the same sentence he imposed in 1953.

case, I would join it. The Court, however, fails to mention and to give effect to certain facts that, for me, are controlling:

1. At his armed bank robbery trial in May 1953 Tucker was no juvenile. He was 32 years of age and was represented by counsel. A reading of his trial testimony discloses that he was very knowledgeable indeed. Tucker testified on cross-examination at that trial not only as to the fact of three prior state felony convictions, but, as well, as to his engaging in the proscribed conduct underlying two of those convictions. He stated flatly (a) that in 1938 he broke into a garage and took a man's automobile, and (b) that in 1946 he broke into a jewelry store at night.[1] He also acknowledged that, while waiting for transportation to prison in Florida after the third con-

[1] "Q. . . . . You were convicted in Florida, were you not?
"A. Yes, I was.
"Q. For what?
"A. Automobile theft, breaking and entering.
"Q. What do you mean 'automobile theft, breaking and entering'?
"A. It boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, received a ten year sentence for it.
"Q. At the age of 17 you received a ten year sentence?
"A. Yes.
"Q. When was that?
"A. 1938.
"Q. You broke into a place and stole a car?
"A. Yes.
"Q. What kind of car did you steal?
"A. '36 Ford.
"Q. Tell us about your other convictions.
"A. 1946 I broke into a jewelry store.
"Q. Where?
"A. New Orleans.
"Q. Night or day?
"A. Night." Trial Transcript 161–162.

viction, he escaped and went to California using an assumed name.[2] Thus, wholly apart from formal convictions, Tucker conceded criminal conduct on his part on three separate prior occasions.

2. The judge who presided at Tucker's pre-*Gideon* trial for armed bank robbery in 1953 was the Honorable George B. Harris of the United States District Court for the Northern District of California. After Tucker's conviction by a jury Judge Harris imposed the 25-year maximum sentence prescribed by 18 U. S. C. §§ 2113 (a) and 2113 (d). Despite the interim passage of 16 years, Tucker's present petition, filed pursuant to 28 U. S. C. § 2255, also came before the very same Judge Harris, then Chief Judge of the Northern District. The judge denied relief on the ground that the error in the use, for impeachment purposes, of two constitutionally invalid prior convictions was harmless beyond a reasonable doubt (a) because the issue of guilt or innocence was not at all close, (b) because Tucker's testimony "had been successfully impeached by prior inconsistent statements made to the Federal Bureau of Investigation agents, and by rebuttal testimony which demonstrated that portions of [his] testimony [were] improbable and untrue," and

[2] "Q. Why did you use the name of Rick Bellew, if you did?
"A. Because I was a fugitive from Florida.
"Q. You were a what?
"A. A fugitive.
"Q. A fugitive from what?
"A. I had been sentenced to a term in Florida for the third conviction that you just brought up, and while waiting transportation to prison I was given a chance to—nobody was watching me, and I walked off down there and came out to California.
"Q. Where did you walk away from?
"A. I was having my appendix removed in the hospital . . . ." Trial Transcript 166.
". . . [H]e found me guilty and subsequently I escaped and came out here. . . ." Sentencing Transcript 230.

(c) because his "testimony was successfully impeached, and in fact, demolished by additional items." *Tucker* v. *United States*, 299 F. Supp. 1376, 1378 (ND Cal. 1969). As to all this, on the issue of guilt, the Court of Appeals agreed, 431 F. 2d 1292, 1293 (CA9 1970), and this Court today does not rule otherwise.

Chief Judge Harris' § 2255 ruling translates for me into something completely inescapable, namely, that in 1953, wholly apart from the 1938 and 1946 convictions, he would have imposed the 25-year maximum sentence anyway. Surely Judge Harris, of all people, is the best source of knowledge as to the effect, if any, of those two convictions in his determination of the sentence to be imposed. Yet the Court speculates that, despite his identity and despite his obvious disclaimer, Judge Harris might have been influenced in his sentencing by the fact of the two prior convictions, rather than by the three criminal acts that Tucker himself acknowledged.

On remand the case presumably will go once again to Judge Harris, and undoubtedly the same sentence once again will be imposed. Perhaps this is all worthwhile and, if so, I must be content with the Court's disposition of the case on general principles. I entertain more than a mild suspicion, however, that this is an exercise in futility, that the Court is merely marching up the hill only to march right down again, and that it is time we become just a little realistic in the face of a record such as this one.

I would reverse the judgment of the Court of Appeals insofar as it remands the case to the District Court for resentencing.